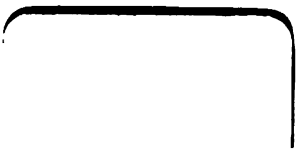

To the Editor of The Law

THE LAW

OF

USAGES AND CUSTOMS.

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OF

USAGES AND CUSTOMS.

A Practical Law Tract.

BY

J. H. BALFOUR BROWNE,

OF THE MIDDLE TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW,
REGISTRAR TO THE RAILWAY COMMISSIONERS,
AUTHOR OF "THE LAW OF CARRIERS," "THE MEDICAL JURISPRUDENCE OF INSANITY," ETC.

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THE LAW

OF

USAGES AND CUSTOMS.

CHAPTER I.

OF CUSTOMS GENERALLY.

Introduction.

I DO not purpose to search for or in this place to expound the fundamental principles of all law, but to point out how large a portion of our law—which may be looked upon as crystallized common-sense, and rational experience—was at one time, in an amorphous form of heterogeneous custom. Indeed, all laws have been in practice before they were put in words, just as every act had its origin in intention. Laws have to do with the conduct of mankind, but they are themselves the result of the conduct of men. They are the result of the enduring sentiments and protests of the good against the ephemeral backslidings of the evil. All laws float in men's minds long before they send down a precipitate of imperative words. It must have been understood by men that theft —the act of taking the property of another without his consent—was wrong before they made a law to punish the thief, with the view of preventing similar depredations. But long before men made a law they had bolts to their doors, and if they caught the robber they exercised their right by taking his booty from him and possibly even by in-

flicting upon him a vengeful punishment. This was not done by one man but by many, and we see in it the embryonic custom out of which the law has developed. There has been a gradual evolution of law from the nebulous justice which was scattered in men's minds and found an expression in their conduct, to the Statute Book and the whole body of text-book-law. The real legislature is the people, and the legislative machinery which exists in this country, including the Queen, the Houses of Lords and Commons, and the Courts of Law, are only a means by which the will of the people may be ascertained and reduced to writing. What I here argue is, that the legislature is second in point of time to the executive, that custom went before law, and, indeed, that law is nothing but agreed upon usage. A very little consideration will convince the reader of the truth of these propositions (*a*).

Illustration of these principles.

One of the most remarkable instances of the conversion of a custom into a law occurred in connection with the Landlord and Tenant (Ireland) Act, 1870 (33 & 34 Vict. c. 46). What is most curious in connection with that legislative act is that it legalized a custom, or a variety of customs, which vary in every county, the real nature of which is only very imperfectly understood. But the fact remains that here has been the recognition of a tangible custom however multiform, however various, by law,—the confirmation of usage by act of Parliament. As an understanding of the facts connected with the custom of Ulster tenant-right will much facilitate the clear comprehension of the propositions set forth above it may not be inexpedient to describe shortly the claim or right which was conferred upon the tenant by this custom which affected the relations of landlord and tenant in Ireland. The Irish Land Act assumes that a custom which bore upon the relations of landlord and tenant prevailed in the province of Ulster, and that it prevailed in forms varying accord-

The custom of Ulster.

(*a*) *Ex non scripto jus venit, quod usus comprobavit: nam diuturni mores consensu utentium comprobati legem imitantur*, Inst. i. 2, 9; D. i. 3, 32. See *United States* v. *Arredondo*, 6 Pet. 691, 714.

ing to local usages. There is, however, no definition of the custom to which the sanction of the law is given. Indeed, men are not agreed as to the nature or extent of the privileges it conferred. As to the character of the custom, Mr. Gladstone, in introducing the Bill, said, "The view we take of it is that it includes two elements—it includes compensation for improvements and it includes the price of goodwill . . . . We do not attempt to modify the custom; we do not inquire into its varieties (it is well known to vary within certain limits); we do not attempt to improve it or to qualify it: we leave it to be examined as a matter of fact, and when it shall have been so ascertained the judge will have nothing to do but to enforce it." (*b*). The attention of the Commission of Enquiry into the Law and Practice in relation to the occupation of land in Ireland, which was issued in 1843 under the Presidency of the Earl of Devon, was of course directed to the Ulster custom, but even the report gives no very clear and distinct definition of the nature of the custom. In the preface to Lord Devon's digest which was published after the report of the Commission there are some sentences which throw a little light on the subject; he says, "the tenant claims what he calls 'tenant-right' in the land, irrespective of any legal claim vested in him, or of any improvement effected by him," and further on: "It is difficult to deny that the effect of the system is a practical assumption by the tenant of a joint proprietorship in the land, although those landlords who acquiesce in it do not acknowledge to themselves this broad fact, and that the tendency is gradually to convert the proprietor into a mere rent-charger, having an indefinite and declining annuity, or the lord of a copyhold." . . . . "It is in the great majority of cases not a reimbursement for outlay incurred or improvements effected on the land, but a mere life assurance or immunity from outrage. Hence the practice is more accurately and significantly termed 'selling the good

As to nature of tenant right.

Definition of tenant right.

(*b*) Hansard's Parliamentary Debates, vol. 199, p. 365.

will.'" Here, then, it is evident that the Ulster tenant-right originated in an equity arising to the in-coming tenant from the sanction given by the landlord to his purchase of his farm. A fair and just man could scarcely deprive him of the right of realizing the sum which had been paid with his sanction, and hence arose the obligation to permit him to sell again, and in this obligation enforced by public opinion, carried out in public practice, consisted the whole custom of Ulster tenant-right. In Mr. O'Connell's report upon the effect of the evidence given before the Commission, the description of the custom is as follows :—

The custom described.

"That according to the practice of this right no person can get into the occupation of a farm without paying the previous occupier the price of his right of occupation or good-will, whether the land be held by lease or at will. That on the ejectment of any occupying tenant he reserves the full selling value of his tenant-right, less by any arrears due to the landlord. That the same custom, unrecognized as it is by law, prevents the lord who has bought the tenant-right, or otherwise got into possession of a farm, from setting it at such an increase of rent as to displace tenant-right. Thus, middle men are almost unknown, and the effect of competition for land is principally to increase the value of the tenant-right, not the amount of the rent. That tenant-right exists even in unimproved land, and that five years' purchase is an ordinary payment for the tenant-right of such land, while fifteen or twenty years' purchase is often given for the tenant-right of highly improved farms."

The effect of the evidence of Mr. Senior, who at one time filled the office of Assistant Poor-Law Commissioner, before the Townland Valuation Committee in 1844, was to the effect that Ulster tenant-right entitled the tenant to the difference between the actual rent of his farm and the competition price which could be obtained for it, and that it did not matter whether the difference could be referred to improvements effected by the tenant and his predecessor

in title, or to the fact that the farm was held originally at a low rent. He regarded it as an essential ingredient of the custom that the rent should not be raised on the incoming tenant, but suggested that the real difficulty in understanding the custom was to determine why the landlord did not increase the rent (*c*). Here, then, we have a most curious custom which seems to have imposed restrictions upon the legal right of the landlord to raise his rents, and we see that that custom has by an act of the legislature become law. That this custom may have resulted from the fact that land increases in value, without the interposition of landlord or of tenant, an increase which some political economists have suggested should be appropriated to the use of the state, but which has in practice been found so inseparable and indistinguishable from the increased value which has resulted from improvements, which were by consent allowed to belong to the tenant, that they have not been distinguished in proprietorship, and hence the institution, it seems to us, of tenant-right and the gradual limitation of the landlord's ownership. So much for this curious experiment which possesses much interest to the student of the science of jurisprudence. We see here the transformation of custom into statute law. The usual course has been to find custom creeping into the common law through the decisions of the Courts, and it may be useful to consider in this place, as preliminary to the main purpose of this work, that branch of the common laws which goes by the name of "customs," the thorough understanding of which cannot fail to throw light upon the law of usage.

Suggested origin.

Customs are said to be either, 1, General, or those which prevail throughout the whole kingdom; or, 2, Particular, those which for the most part affect only the inhabitants of a particular place, or the members of a particular class. Concerning general customs we need say little, just because

General customs.

(*c*) See also as to this subject, Mr. Isaac Butt's Treatise on the new Law of Compensation to Tenants in Ireland and the other provisions of the Landlord and Tenant Act, 1870. Dublin, 1871.

so much might be said. By these, wherever they are applicable, the proceedings and determinations of the ordinary courts of justice are guided and directed, by these the course in which lands descend by inheritance, the method of acquiring and transferring property, the requisites and obligation of contracts, the rules for the construction of wills, deeds and acts of Parliament, the respective remedies for civil injuries, and many other important particulars are settled and determined. The ordinary illustrations of this regulating influence are, that the eldest son alone is heir to his ancestor; that a deed is of no validity unless sealed and delivered; that wills shall be construed favourably, and deeds strictly; that money lent upon bond is recoverable by action of debt; and that breaking the public peace is an offence punishable by fine and imprisonment.

Validity of.

But it is evident that these usages have received the validity of recognition. They have been acknowledged to exist by the judges of the several courts of justice. The decisions of these judges are recognitions of prior facts, and the way that these prior facts were dealt with, that is the recognition of a custom. In this way it has been held that judges are the depositories of the laws, and living oracles. They are bound by an oath to decide all cases according to the law of the land, that is, according to the customs already recognized; and hence the fitness of those for the judicial office who have derived extensive knowledge from wide experience and accurate study. These judicial decisions, then, are the most authoritative evidence of the existence of such a custom as shall form part of the common law of the land. In this way we find uncertain practice becoming certain and permanent rule, and that not on account of the opinion of any judge, but upon the accumulated recognitions of many, not upon the promulgations of a new doctrine, but on the maintenance and exposition of an old one. That this is so is proved by the fact that where the determination existing is contrary to

reason, where the recognition of what was thought a custom has been a recognition extorted by false facts, or brought about by mistaken impressions, the judge is not to be bound by a former decision, but is to vindicate the older law of common-sense and reason as manifested in conduct. Here he makes no new law in overruling an antecedent decision, which if it was unjust or unreasonable, was not law at all. He decides that it is not the established custom of the land, as has been erroneously determined. Thus there is a truth in the saying that what is not reason is not law (*e*). The decisions of courts of justice then, are the evidence of what constitutes the common law. Although the circumstances of each case vary, the principles of many are the same. Were it not so there never could have been a custom, and consequently there never could have been a law. It is thus the recognition of the unity of principle in the variety of details which is the peculiar work of the lawyer and the judge. Where, however, a new case has to be decided, where analogy will not help as an authority or a guide, the lawyer must have recourse to what is called his discretion or common-sense, which is, in fact, customary reason—and decide according to his knowledge of the customs of mankind—which will include considerations of what is just, what is expedient, and what is sanctioned by a large experience of public policy (*f*). There is one other kind of evidence of general custom, as constitutive of the common law, and that is, the writings of Glanville, Bracton, Britton, Fleta, Hengham, Littleton, Statham, Brooke, Fitzherbert, Staundford, and Coke. The treatises by these writers are cited as authority, and as evidence that cases formerly occurred in which the points stated in these writers were determined in a certain way—points which have in many instances become established principles of English law (*g*).

Common law, how evidenced.

Evidence of general custom.

(*e*) Generally as to the authority of decided cases, see Ram's Science of Legal Judgment, chap. 3.

(*f*) See Co. Litt. 66a.

(*g*) Sir Henry Sumner Maine has some curiously interesting speculations

The scope of this work.

The subject of general customs clearly falls beyond the scope of this work, except in so far as its consideration may serve as a useful introduction to the answering of questions which will fall under our cognizance in these pages; and except in so far as the principles which are the foundation of these may serve to illustrate the principles which will occupy our attention in connection with particular customs and usages.

Particular customs.

The particular customs which form, what text writers call, the second branch of the unwritten laws of England, which are actually laws affecting the inhabitants of a particular place or district (*h*), are also beyond the scope which has been limited to us by our intention, and a mention of these will be all that will be necessary in this place. It is doubtless true that these particular customs, which are contrary to the general law of the land, are the remains of a multitude of local customs prevailing, some in one part, some in another, over the whole country, while it was divided into separate dominions. When these separate kingdoms became united under one rule, a unity of custom was the inevitable result, and this unity of custom was the cause of our uniformity of laws. The history of law is parallel to the history of race. And just as many races under one peaceful rule will become one race—representing in a modified form the peculiarity of each—so many systems of laws—or those hypotheses of laws, or provisional laws, customs—will under one rule become one system, which will have the modified characteristics of many of the systems from which it derived its origin. But, further, just as in ethnology, we discover instances in which a race, even under the most favourable

upon the influence which successive comments of Jurisconsult upon Jurisconsult have had in developing the law, in his work upon "Village Communities" (Sect. 2) in which he endeavours to explain how it comes about that the interpretation of written law by successive commentators, tend to improve and liberalize a system of jurisprudence more than the English method of what may be called "Natural Selection" or by decided cases. The reader may consult that able work with advantage.

(*h*) See Co. Litt. 110b.

conditions, has remained distinct and separate in the midst of another race, although living under a common rule and associated in peace, in intercourse, and in commerce, so we find in the study of jurisprudence that certain customs, or systems of laws, have remained separate and distinct in the midst of a wide and uniform law, and have retained their characteristic peculiarities in spite of many conditions which favoured an amalgamation and a unification of these various systems. These so-called customs have in many cases been confirmed to the districts which have the privilege of enjoying them by various Acts of Parliament (*i*). Amongst these we find the custom of *Gavelkind* in Kent, and in some other parts of the kingdom (though, perhaps, it was general until the time of the Norman Conquest), by which, amongst other things, all the sons, and not the eldest only, succeed to their father's inheritance (*j*), and by which, though the ancestor be attainted and hanged, the heir, nevertheless, succeeds to his estates without any escheat to the lord (*k*); and the custom which prevails in divers ancient boroughs and which is therefore called *Borough-English*, by which the youngest son inherits the estate in preference to all his elder brothers — the custom in other boroughs which entitles a widow to all her husband's lands for her dower, instead of only one-third part, to which alone she is entitled under the common law (*l*). Amongst these also are the special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants that hold of the said manors (*m*); and also the many particular customs which exist within the city of London, and which have reference to trade, apprentices, orphans, widows, and many other

Gavelkind.

Borough-English.

Customs of manors.

Customs of London.

(*i*) Mag. Cart. 9 Hen. 3, c. 9; 1 Edw. 3, st. 2, c. 9; 14 Edw. 3, st. 1, c. 1; 2 Hen. 4, c. 1.
(*j*) Co. Litt. 140a.
(*k*) See as to Gavelkind, Sandy's *Consuetudinis Rancicæ*.
(*l*) See the History of Boroughs, by Merewether and Stephens.
(*m*) See Scriven on Copyhold and Customary Freehold.

matters (*n*). These last are conformed by Act of Parliament (*o*).

These, then, are the customs to which the term is most frequently applied, although, it seems to us, that such an exclusive application of the word is calculated to confuse and mislead. Such customs as Gavelkind and Borough-English have been noticed by law (*p*), and there is now no need to prove the nature of such customs, but only that the lands in question are subject to them. When the customs of London, such as the custom of foreign attachment (*q*), the custom that every shop is a market overt for goods of the same kind as are usually sold there (*r*); the custom that married women may be sole traders (*s*); the custom as to the distribution of the effects of intestate freemen (*t*); and the custom which defines the nature of a liveryman's office (*u*), are called in question at a trial, their existence is to be decided, not by a jury, but by a certificate from the Lord Mayor and aldermen by the mouth of their recorder (*x*), except in the case where the custom was of such a nature as that the corporation is itself interested; under such circumstances the question is tried, not by certificate, but by a jury, for "the law permits them not to certify on their own behalf." (*y*) Some other customs, such

Customs of London how proved.

Other customs recognized.

(*n*) See Pulling on The Laws and Customs of London. *Bradbee* v. *Christ's Hospital*, 2 D. N. S. 164; 5 Scott, N. R. 79; *Arnold* v. *Poole*, 4 M. & G. 860; 5 Scott, N. R. 761; *Bulbroke* v. *Goodeve*, 1 W. Bl. 569; *Lyons* v. *De Pass*, 3 P. & D. 177; 11 A. & E. 326; 9 C. & P. 68.

(*o*) See the *City of London's case*, 8 Rep. 126; *The King* v. *Bagshaw*, Cro. Car. 347; see also Pulling on The Laws and Customs of London.

(*p*) Co. Litt. 175.

(*q*) Certified by Starkey in 22 Edw. 4. See 1 Roll. Abr. 554 (K.) 5; *Bruce* v. *Wait*, 1 M. & G. 39; *Crosby* v. *Hetherington*, 4 M. & G. 933.

(*r*) Certified by Sir E. Coke, 5 Rep. 83b, and in Moore, 360. See also *Lyons* v. *De Pass*, 11 A. & E. 326.

(*s*) *Lavie* v. *Phillips*, 3 Burr. 1776.

(*t*) *Bruin* v. *Knott*, 12 Sim. 452.

(*u*) *King* v. *Clerk*, 1 Salk. 349.

(*x*) *Appleton* v. *Loughton*, Cro. Car. 516; see also Pulling, Laws and Customs of London, p. 11; *Hartop* v. *Hoare*, 1 Wils. 8; 2 Stra. 1187; *Blacquire* v. *Hawkins*, 1 Dough. 378; *Plummer* v. *Bentham*, 1 Burr. 248; *Crosby* v. *Hetherington*, 5 Scott, N. R. 637; 12 L. J. C. P. 261; *Piper* v. *Chappell*, 14 M. & W. 624.

(*y*) *Day* v. *Savadye*, Hobart's Rep. 85.

as the custom or law of the road—viz., that horses and carriages should respectively keep on the near or left side (*z*); or that ships and steamboats on meeting should port their helms so as to pass on the port side of each other (*a*); or that steamboats navigating narrow channels should, whenever it is safe and practicable, keep to the starboard, or right side of the fair-way (*b*)—will be recognized by the judges without proof.

Custom of merchants.

Many writers exclude from the term custom those rules relative to bills of exchange, partnership, and other mercantile matters, which have been classed under the head "custom of merchants" by Blackstone (*c*), on the ground that their character is not local, and that their binding force is not confined to a particular district. It has been remarked that the Law Merchant is in truth only a part of the general law of England (*d*), and that courts of law must take notice of it as such. Doubtless where the custom of merchants is established and settled by known decisions, it is "the general law of the kingdom," and ought not to be left to a jury after it has been already settled by a judicial determination (*e*).

When custom of merchant's must be proved.

But there are some questions the decision of which depends upon the customs amongst merchants, which have not hitherto met with judicial recognition, and in such cases it is fit and proper to take the opinions of merchants thereon (*f*). In former times it was not uncommon for

(*z*) See *Leame* v. *Bray*, 3 East, 593; *Turley* v. *Thomas*, 8 C. & P. 104, *per* Coleridge, J.

(*a*) 17 & 18 Vict. c. 104, sec. 296.

(*b*) 17 & 18 Vict. c. 104, ss. 297, 298, 299. See *Morrison* v. *Gen. Steam Nav. Co.*, 8 Exch. 733; *Gen. Steam Nav. Co.* v. *Morrison*, 13 C. B. 581.

(*c*) 1 Com. 75.

(*d*) *Per* Holt, C. J., *Hussy* v. *Jacob*, Ld. Raym. 88; *per* Forster, J., *Edie* v. *East India Company*, 2 Burr. 1226; 1 Bl. Rep. 299, S. C. 2 Inst. 58; *Stone* v. *Rawlinson*, Willes, 561; see also *Benson* v. *Chapman*, 8 C. B., N. S. 967, note; see *Cookendorfer* v. *Preston*, 4 How. 317; and see *Mayill* v. *Brown*, Bright, 346, 365.

(*e*) *Per* Forster, J., 2 Burr. 1226; see also what Buller, J. said in *Lickbarrow*, v. *Mason*, 2 T. R. 73.

(*f*) *Per* Wilmot, J., *Edie* v. *East India Co.*, 2 Burr. 1228. That judge said: "There may indeed be some questions depending upon customs amongst

judges to confer, touching points of mercantile law, with those persons who might be supposed to be conversant with it, and it is said that Lord-Chancellor Hardwicke adopted this course in the case of *Kruger* v. *Wilcox* (*g*); and that Lord Mansfield followed his example in a case in which a question of some importance had arisen upon a sea policy of insurance (*h*).

General and local usages.

The mercantile law consists, then, of general and local usages, and these are easily distinguished, although they not unfrequently pass into one another. Thus it is that many local customs which prevail at the present time in a particular market or at a particular port, may at one time have been general customs; while some of the customs that are at the present time universal in the trade and commerce of this country must have been confined to much narrower limits. A local custom may, as we shall hereafter see, by being tacitly incorporated with a contract, be, in point of fact, a law to the parties contracting; yet, it is evident that when such a custom is relied upon it must be proved before the Court will take notice of it.

General usage.

A general usage, when it has been ascertained and established, becomes a part of the Law Merchant, which courts of justice "are," in the words of Lord Campbell, "bound to know and to recognize." (*i*) "Such," he went on to say, "has been the invariable understanding and practice in Westminster Hall for a great many years, there is no decision or *dictum* to the contrary; and justice could not

merchants, where if there is a doubt about the custom it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful, and even then the custom must be proved by facts not by opinion only."

(*g*) Ambler, 252.

(*h*) *Vallejo* v. *Wheeler*, 1 Cowp. 143.

(*i*) *Brandão* v. *Barnett*, 12 Cl. & F. 805. The words of his lordship show that the principle of utility has been at work in this natural selection of laws from a variety of customs. "Those customs," he says, "which have been universally and notoriously prevalent amongst merchants and have been found by experience to be of public use have been adopted by it (the Law Merchant) upon a principle of convenience, and for the benefit of trade and commerce; and where so adopted it is unnecessary to plead and prove them."

be administered if evidence were required to be given *toties quoties* to support such usage if issue might be joined upon them in each particular case."

The name "custom" when to be applied.

So far, then, as the usage of merchants has been judicially ascertained and established, so far as it has become the acknowledged law of the land, it has, it seems to us, ceased to deserve the name of custom, just as much as Gavelkind or Borough-English (*k*); but where a general custom exists amongst merchants which has not been judicially recognized, or particular usage exists in a particular market, which must be proved at Nisi Prius by the person who wishes to avail himself of it, it seems equally clear that the term custom is applicable, and that the laws of validity and rules of proof which we have to consider in this work are thoroughly apposite.

But on the same principle, that the obligation of a particular custom must be confined to a particular district, it has been said that the usages of particular trades, when not restricted to some particular limits, but extended to the realm at large, cannot with propriety be considered as customs in the technical sense of that term (*l*). Here also a usage of immemorial observance, which has received judicial sanction, becomes part of the general law of England, just as much as if it were incorporated in an act of Parliament it would become part of the statute law. These seem to us to be undeserving of the appellation customs, which we would reserve for law when it is being modelled in clay—so to speak—and before it has been transferred to the marble (*m*). Custom seems to us to be applicable to the law before it has been recognized as law,

(*k*) See an American case, *Cookendorfer* v. *Preston*, 4 How. 317, and see *Magill* v. *Brown*, Bright. 346.

(*l*) Co. Litt. 115b.

(*m*) It may be known to most readers that the method of sculpture as practised at the present time, is to mould the figure in clay, and by means of what may be called a many-jointed pair of compasses, and chisel work to transfer the outlines to the marble. The moulding is the work of the sculptor; the cutting of the marble can be accomplished by ordinary ungifted workmen.

but when it is in a condition to claim judicial sanction, whether that sanction is authenticated by judicial decision or by legislative enactment. Our object, then, in the following pages is to state the law which is applicable to such usages and customs; the rules of evidence which will enable the practitioner to determine the existence of an alleged custom; the rules of law which will enable him to determine its legality, when its existence is established; and the rules which will enable him to put the correct legal construction upon it. The importance of this inquiry can be measured by the frequency with which cases involving the discussion of the admissibility of parol evidence of custom or usage to vary, add incidents to, or explain the meaning of written contracts, come before courts of law.

Custom and prescription.

We purpose in the first place to set out succintly the rules which apply to the validity of a custom, and before doing so it may be well to distinguish between custom and prescription, which are not unfrequently confounded, and the appreciation of the disparity in principle which exists between them will conduce to the better understanding of each (*n*). Prescription seems to us to be the making of a right, custom the making of a law. Prescription has its meaning in the volition of an individual, while custom has its meaning in the wills of a large number of individuals. Prescription is creative of a right which gets its sanction from law, custom is creative of a law which gives its sanction to rights. It will be seen that these two are clearly distinguishable, and the confusion which has existed in some minds can scarcely be accounted for. The fact that it existed, and not any good grounds for its existence, has necessitated this explanation.

Validity of custom.

The rules which bear upon the validity of a custom are

(*n*) The distinction between custom and prescription, which has been drawn before will be found to be parallel to the one given in the text. According to it custom is a local usage not annexed to any person, whereas prescription is merely a personal usage, as that L. and his ancestors or those whose estate he has, have used time out of mind to enjoy a particular advantage or privilege. 2 Bla. Com. 263; *per* Cur., *Mayor of Lyme Regis* v. *Taylor*, 3 Lev. 160.

these—1. It must have been used so long that the memory of man runneth not to the contrary (*o*). Thus, if an usage can be shown to have commenced, it is void as a custom, and that upon grounds which will recommend themselves as reasonable. Of course, every custom must have had a commencement, but if we can discover its inception, then we discover the individual by whose particular will the custom had its birth; but that discovery negatives its existence as a custom which cannot have its origin in the impotent act of any particular individual, but in the will of the whole. No one man can be allowed to make a law. If, however, all evidence of the commencement of a custom is wanting, the proof that it has been practised for a long time, and that it has been observed as far back as the memory reaches, will amount to presumptive proof of its having prevailed during the whole period of legal memory (*p*). The law, however, with reference to the principle, which requires the proof of immemoriality in support of a custom, has been modified to a considerable extent by the statute 2 & 3 Will. 4, c. 71, which provides as to customary and prescriptive claims of rights to be exercised over the land of other persons (such as the rights of common, or way, or use of light), that they shall be considered as sufficiently established by an uninterrupted enjoyment as of right, in some cases for thirty, in others for twenty, years, and shall not be defeated (where such enjoyment can be proved) by showing that they commenced within the time of legal memory (*q*).

2 & 3 Will. 4, c. 71.

2. A custom, in order to be valid, must have been con- Uninterrupted.

(*o*) The time of *legal* memory has received a technical limitation, and refers to so early a date as the commencement of the reign of King Richard the First. Co. Litt. 115a.

(*p*) *Rex* v. *Joliffe*, 2 B. & C. 54; *Jenkins* v. *Harvey*, 1 Cr. M. & R. 877; cited *Master Pilots, &c., of Newcastle-upon-Tyne* v. *Bradley*, 21 L. J. Q. B. 196, S. C. 2 E. & B. 428 n.; see also *Duke of Beaufort* v. *Smith*, 4 Exch. 450; *Simpson* v. *Wells*, 7 L. R. Q. B. 214.

(*q*) See as to statute *Shuttleworth* v. *Le Fleming*, 19 C. B., N. S. 687; 11 Jur. N. S. 840; *Hanmer* v. *Chance*, 11 Jur. N. S. 397; 34 L. J. Chanc. 413. Upon this see Mr. Shelford's notes in his edition (7th) of the Real Property Stats. pp. 2, 6.

tinued. If a custom ceased and recommenced, its new beginning would be within the memory of man, and would be due to the will of an individual, which would exclude it from the definition of a custom, and make any usage subject to such a lapse void as a custom. But an interruption which is to prove valid as against a custom, must be an actual interruption of the usage, and not simply an interruption of the possession of the right (*r*). One of the common illustrations will serve to make this clear. Thus, if the inhabitants of a parish have a customary right to water their cattle at a certain pool, a mere discontinuance of the practice for ten years would not destroy the custom, although it would add to the difficulties of proving its existence. If, however, the right be discontinued for a single day, that would prove the non-existence of any asserted custom analogous with the right. But it must be remembered that the existence of a custom depends upon proof, and that the discontinuance of a custom as it tends to increase the difficulties of proof, tends, also, to that extent, to the abolition of the custom. It cannot be doubted that a custom can be abrogated by a custom, and that many of the usages which at present exist are built upon the ruins of forgotten customs. That these antecedent customs which differ from our present practice, or common habit, must be forgotten, to render our present custom valid is evident, otherwise the custom which is now in vogue would not have that element of antiquity and immemoriality to which we have already alluded. But as the acts of some make a law, so can the acts of some abrogate it. "A custom," said Tindal, C. J., in his judgment in *Tyson* v. *Smith* (*s*), "comes at last to an agreement which has been evidenced by repeated acts of assent on both sides from the earliest times, before time of memory, and continuing down to our own times, that it has become the law of a particular place." There is a

Illustration.

Analogy between custom and language.

(*r*) Co. Litt. 114.
(*s*) 9 A. & E. 406 at p. 425.

curious analogy between customs and language which we shall have to point out more than once with the view to elucidation and illustration. Language is for the expression of human thought, and in that it is so it is also a record of the past effort of human intelligence. Custom, which has arisen from human practice, from the factual language of transactions, is not only a record of the past conduct of men, but is at the same time a vehicle for the expression of intention to those who find usage ready to their hand. But there is a close analogy between the two. As language has passed from unity to diversity and variety, so has law passed from a central unity into a scattered and careless variety of custom, so that every place has its particular law of custom. "Dialects," says Grimm, "develop themselves progressively, and the more we look backward in the history of language the smaller is their number and the less definite their features. All multiplicity arises gradually from an original unity" (*t*).

Development of customs.

Might we not apply almost the same true words to customs—which in our estimation bear an exactly similar relation to a system of law that dialects do to a language—that the great German philologist has applied to dialects, and say that customs have developed themselves progressively, and that the unity which we find in the history of jurisprudence has been developed into the variety of customs which we find at the present time. This capability of change in law is not an indication of its inferiority, but of its vitality. So long as men progress, so long as new events happen, new trades arise, new commerce floats upon hitherto unsailed seas, new manufactures change the features of our lives, and new and higher principles take the place of those which governed conduct, regulated acts, and guided life, so long must we expect progressive change and almost lavish variety in our customs. When a people is dead, when there are no transactions to be governed, no rights to protect, no in-

(*t*) Geschichte der Deutschen Sprache, s. 833.

Dead laws.

terests to regard, the law may remain unchanged, for the law is dead. We have indeed dead laws just as we have dead languages, and the words of Professor Max Müller, which are spoken with regard to the life of a language, are equally applicable when applied to a system of laws. "As soon," he remarks, "as a language loses its unbounded capability of change, its carelessness about what it throws away, and its readiness in always supplying instantaneously the wants of the mind and heart, its natural life is changed into a merely artificial existence" (*u*).

We cannot blame ourselves for this digression if it enables the reader more thoroughly to appreciate the relation which exists between custom and law, if it enables him to understand that customs are, as it were, the feeders of law, and that there is always a slow process of customary regeneration going on, which will be observable to the diligent student of legal history, and which makes up for gradual decay of law which is going on *pari passu*, and which results from the gradual tendency that almost every fixed enactment has to become obsolete.

Peaceable enjoyment.

3. A custom must, in the third place, have been peaceably enjoyed and acquiesced in to be valid. If it has been the subject of contention and dispute it has not recommended itself as expedient to all, and the fact that it has proved a convenience to some is counteracted by the fact that it has also proved an inconvenience to many. But the non-consent of these is as powerful as the consent of

(*u*) "I very much doubt," said Mr. Disraeli in his speech on the Irish Land Bill (33 & 34 Vict. c. 46), "the propriety, as a general principle, of legalizing customs. The moment you legalize a custom you fix its particular character; but the value of a custom is its flexibility and that it adapts itself to all the circumstances of the moment as of the locality. All these qualities are lost the moment you crystallize a custom into legislation. Customs may not be as wise as laws, but they are always more popular. They array upon their side alike the convictions and the prejudices of men. They are spontaneous. They grow out of man's necessities and inventions, and as circumstances change and alter and die off, the custom falls into desuetude and we get rid of it. But if you make it into a law, circumstances alter, but the law remains and becomes part of the obsolete legislation which haunts our statute book and harasses society." (Hansard's Debates, vol. 199, p. 1806, delivered 11th March, 1870.)

those; and as customs, to be valid, owe their efficacy to common consent, the fact that they have been immemorially disputed proves that that universal consent was wanting.

Reasonable.

4. A custom must be reasonable (*x*). Or as it is perhaps better to put it negatively, it must not be unreasonable (*y*). We shall see hereafter that the words "not unreasonable" must be understood in a legal sense, or that in coming to a conclusion as to what customs are reasonable and what unreasonable, regard must be had to the legal decisions which have been made in times past upon cases involving a similar question. "Reasonable," says Sir Edward Coke, "is not always to be understood of every unlearned man's reason, but of the artificial and legal reason warranted by authority of law" (*z*). Thus it comes that a custom may be good, though the particular reason of it cannot be assigned; for it suffices, if no good legal reason can be assigned against it. A custom is not unreasonable merely because it is contrary to a particular rule or maxim of the common law, otherwise Gavelkind and Borough-English, which are directly contrary to the ordinary law of descent, or the custom of Kent, which is contrary to the law of escheats, would not be valid customs; indeed it is the very essence of a custom that it should vary from the common law (*a*). Nor is a custom unreasonable because it is prejudicial to the interests of a private man (*b*), if it be for the interests of the commonwealth; as, for instance, the custom to turn the plough up on the headland of another, which is for the good of husbandry, or to dry the nets on the land of

Meaning of reasonable.

Private interests.

(*x*) *Tanistry's case*, Sir J. Davis' Rep. 32; *Hilton* v. *Earl Granville*, 5 Q. B. 701; *Wilkes* v. *Broadbent*, 1 Wils. 63.

(*y*) 1 Bla. Com. 77; *Hix* v. *Gardiner*, 2 Bulstr. 195.

(*z*) Co. Litt. 62, but see as to usages, *Paxton* v. *Courtnay*, 2 F. & F. 131.

(*a*) *Horton* v. *Beckman*, 6 T. R. 760, at p. 764; *Tyson* v. *Smith*, 9 Ad. & El. 404, at p. 421.

(*b*) *Fawcett* v. *Lowther*, 2 Ves. 300; *Marquis of Salisbury* v. *Gladston*, 9 H. of L. cases, 692.

another, which is in favour of fishing, and for the benefit of navigation (*c*).

Unreasonable customs, what are.

A custom on the other hand which is injurious to the public, which is prejudicial to a class, and beneficial only to a particular individual, is repugnant to the law of reason. No such custom could be capable of becoming law which is a rule for the benefit of all. Thus a custom in a manor that the commoner cannot turn in his cattle until the lord has put in his own is bad, for it is injurious to the multitude, and beneficial only to the lord (*d*). So a custom that the lord of the manor shall have £3 for every proved breach of a stranger (*e*), or that the lord of a manor may detain a distress taken upon his demesne, until fine be made for the damage, at the lord's will (*f*), is bad, on the ground that it is unreasonable. In the case of *Tyson* v. *Smith* (*g*), which was an action in trespass for breaking and entering the plaintiff's close and erecting stalls, booths, &c., there, the defendant justified his conduct under a custom that at fairs holden at certain times of the year on some part of the commons and waste of a manor, to be named by the lord of the manor (the *locus in quo* being parcel of such commons and waste, and named by the lord), every liege subject exercising the trade of a victualler might enter at the time of the fairs, and for the more conveniently carrying on his said trade erect a booth, &c., and continue the same for a reasonable time after the fairs, paying 2*d.* to the lord, it was held that the custom was reasonable, and that the plea was a good justification in trespass brought by the owner of the soil (*h*). It has further been decided that a custom that

(*c*) See judgment, *Tyson* v. *Smith*, 9 Ad. & El. 421 ; *Lord Falmouth* v. *George*, 5 Bing. 286 ; *Race* v. *Ward*, 4 E. & B. 702.

(*d*) Yearb. Trin. 2 Hen. 4, fol. 24, B. pl. 20.

(*e*) 21 H. 4. See 7 Vin. Abr. 183, Customs (F.) 7.

(*f*) Litt. s. 212.

(*g*) 9 Ad. & El. 406.

(*h*) See further, as to observances which have been held as unreasonable, and therefore void as customs, *Clayton* v. *Corby*, 5 Q. B. 415 ; 14 L. J. Q. B. 364 ; *Rogers* v. *Brenton*, 10 Q. B. 26 ; 17 L. J. Q. B. 34 ; *Rockey* v.

a tenant shall have the waygoing crop after the expiration of his term, is reasonable. "It is just; for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is indeed against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly" (*i*).

Custom contravening law of emblements.

5. A custom to be valid must be certain (*k*). This is an element which must necessarily, and by the force of reason, attach to a custom. Any miscellaneous observances, which have no coherence of principle, are necessarily inefficacious as forming a rule of conduct. It is only when observances have shaped themselves into a constant uniformity, only when their characteristics of the past can be a clear light for their incidents in the future, that they rise to the level of a custom, which is the stuff of which law is made. Hence it follows that there must be definiteness or certainty about a custom. Thus it has been instanced since the days of Blackstone that a custom that lands shall descend to the most worthy of the owner's blood, is void on the ground that the custom gives no certain means for the discovery of merit, while a custom that lands shall descend to the next male of the blood, exclusive of females, is certain and good. (*l*)

Custom must be certain.

In an early case it was held that no person has at common law a right to glean in the harvest field, and

Illustrations of certainty.

Huggens, Cro. Car. 220; *Badger* v. *Ford*, 3 B. & Ald. 153; *Mounsey* v. *Ismay*, 1 H. & C. 729; *Hilton* v. *Earl Granville*, 5 Q. B. 701; *Blackett* v. *Bradley*, 1 B. & S. 940, 954-5; *Elwood* v. *Bullock*, 6 Q. B. 383; *Gibbs* v. *Flight*, 3 C. B. 581; *Reg.* v. *Dalby*, 3 Q. B. 602. A reasonable custom, see *Sanders* v. *Jameson*, 2 C. & K. 557; *Gard* v. *Callard*, 6 M. & S. 69.

(*i*) *Wigglesworth* v. *Dallison*, Dougl. 201; 1 Smith, Lea. Cas. p. 539; see also *Mousley* v. *Ludlam*, 21 L. J. Q. B. 64; *Dalby* v. *Hirst*, 1 B. & B. 224; see also *Stratup* v. *Dodderidge*, 2 Ld. Raym. 1158; *Naylor qui Nam.* v. *Scott*, 2 Ld. Raym. 1558.

(*k*) *Tanistry's case*, Sir J. Davis, Rep. 32.

(*l*) 1 Roll. Abr. 565.

that neither have the poor of a parish *legally settled* (as such) any such right, on the ground that such a right would be inconsistent with the nature of property, and that no right can exist at common law unless both the subject of it, and they who claim it, are certain (*m*). So again, to return to the most ordinary, and possibly the best, illustrations of the validity of a custom in its dependence upon certainty or uncertainty, a custom to pay twopence an acre in lieu of tithes is good; but were it to pay sometimes twopence and sometimes threepence, as the occupier of the land chooses, is bad on account of its uncertainty (*n*). "Yet a custom," as Blackstone puts it (*o*), "to pay a year's improved value for a fine on a copyhold estate is good—though the value be uncertain—for the value may at any time be ascertained, and the maxim of the law is *id certum est, quod certum redi potest*" (*p*). A custom, therefore, that all the customary tenants of a manor having gardens, parcels of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor, to be used upon their customary tenements, for the purpose of making and repairing grass-plots in the gardens, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, at all times of the year, as often and in such quantity as occasion hath required, was held bad, as being indefinite and uncertain. And so, also, a custom for the taking and applying of such turf for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences of such customary tenants is invalid for a similar reason (*q*). In that case it is evident that the word "improvement" was most vague; no limita-

Vague customs.

(*m*) *Steel* v. *Houghton*, 1 H. Bl. 51.
(*n*) 1 Bla. Com. 78; *Le case de Tanistry*, Davys, 28 b. 35; *Blewett* v. *Tregouning*, 3 Ad. & El. 554.
(*o*) 1 Bl. Com. by Stephen, p. 61.
(*p*) Broom's Leg. Max. 5th ed. 623.
(*q*) *Wilson* v. *Willes*, 7 East, 121.

tion prevented the tenants, if the custom had been good, from completely destroying the pasture. The only limit to the custom, as Lord Ellenborough remarked, was "caprice and fancy." The privilege was claimed as exercisable when occasion required — a most loose, vague, indefinite, and limitless restriction; upon all these grounds it was impossible to regard such an observance as a custom. A custom to throw earth, stones, coals, &c., in heaps upon land *near* to certain coal pits, was held bad, on the ground that the word *near* is of great latitude, and too loose to support a custom (*r*). On the other hand, in the case of the *Marquis of Salisbury* v. *Gladstone* (*s*), which was in ejectment for a forfeiture by a lord against a copyholder of inheritance, for digging and taking clay from the manor of West Derby, in Lancashire, to be sold off the manor to anyone, the defendant pleaded and proved a custom from time immemorial for the copyholders of inheritance, without licence from the lord, to break the surface and dig clay without limit from and out of their copyhold tenements, for the purpose of making it into bricks to be sold off the manor, such a custom was held good in law. In that case it was not so much on the ground of uncertainty, for "without limit" might mean the whole, which is certain, but on the ground of the unreasonableness of such a custom that its validity was disputed. And Lord Cranworth's remarks upon this subject are not unworthy of attention. "It is true," he said, "that a custom to be valid must be reasonable. It is not easy to define the word 'reasonable' when applied to a custom regulating the relation between a lord and his copyholders. That relation must have had its origin in remote times by agreement between the lord, as absolute owner of the whole manor in fee simple, and those whom he was content to allow to occupy portions of it as his tenants at will. The rights of these tenants must

As to the foundation of custom.

(*r*) *Wilkes* v. *Broadbent*, 1 Wils. 63.
(*s*) 9 H. of L. cases, 692.

have depended in their origin entirely on the will of the lord, and it is hard to say how any stipulations regulating such rights can, as between the tenant and the lord, be deemed void as being unreasonable. *Cujus est dare ejus est disponere.* Whatever restrictions, therefore, or conditions the lord may have imposed, or whatever rights the tenants may have demanded, all were within the competency of the lord to grant, or of the tenants to stipulate for. And if it were possible to show that from the time of legal memory any lawful arrangement had been actually come to between the lord and his tenants as to the terms on which the latter should hold their lands, and that arrangement had been constantly acted on, I do not see how it could ever be treated as being void because it was unreasonable. In truth, I believe that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom" (*t*).

Custom must be obligatory.

6. A custom must be compulsory, otherwise it loses the imperative character of a law. It is true that agreements which were founded in consent were the origin of customs; it is true that the observances which have become, as it were, acted or pictured laws, were at first matters of option; but whenever they are established customs, they must have ceased to be matters of choice, and must have an obligatory element—a binding force. Were it in the option of every man whether he would conform to a custom or not, were it a matter which might be referred for decision to his good pleasure, it is evident that it would be invalid upon the ground which we have already considered, viz., uncertainty. A custom to be

(*t*) See also the *Bishop of Winchester* v. *Knight*, 1 P. Wms. 496; the *Dean of Ely* v. *Warren*, 2 Atk. 189.

binding must be current, it must be known and understood by those whose conduct is to be affected by its existence, whose transactions are to be influenced by its factual terms; but if its terms were alterable at the will of each man, if it was in the option of each man to be bound to-day and not bound to-morrow by the custom, anyone whose conduct might have to conform to such a rule would find it impossible to shape his actions accordingly; any transactions which might have to be influenced by such a precept would be varying, indefinite, uncertain, and absurd (*u*). Thus, in the words of Blackstone, "a custom that all the inhabitants shall be rated towards the maintenance of a bridge will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all" (*x*).

Customs must be consistent.

7. Again, customs must be consistent with each other; one cannot be set up in opposition to another (*y*). If two customs are contradictory, it is evident that they cannot both have been established by mutual consent. Thus the allegation of one custom is not to be met by the allegation of another custom inconsistent with the first, but rather by the denial of the existence of the first as a custom. This rule really might fall under the first, which demands the moment of reasonableness for a custom, for the absurdity and unreasonableness of two mutually inconsistent customs is evident, and if one custom be admitted to exist, the other which is inconsistent with it violates the requisite of reasonableness, and is therefore invalid.

Customs, how construed.

8. We come now to the question of the interpretation

(*u*) *Adams* v. *Otterbark*, 15 How. 539. The same doctrines prevail in the law of the United States, where it has been held that a usage or custom of trade is the law of that trade, and to make such a custom at all obligatory, it must be ancient, so as to be generally known, certain, and reasonable. Therefore a usage of such doubtful authority as to be known only to a few, or where merchants of a trade differ as to its existence, will not be regarded. *Collins* v. *Hope*, 3 Wash. C. Ct. 149; compare *Donnell* v. *Columbian Ins. Co.*, 2 Sumn. 366; *Wilcocks* v. *Phillips*, 1 Wall. Jr. C. Ct. 47.

(*x*) 1 Bl. Com. by Stephen, 61.

(*y*) See *Aldred's case*, 9 Rep. 58 b; *Kenchin* v. *Knight*, 1 Wils. 253; *Parkin* v. *Radcliffe*, 1 Bos. & Pul. 282.

of special customs. One of the principal rules to be noted is, that customs in derogation of the common law are to be strictly construed (*z*). There is always a presumption against a thing while it is only in the making, and a presumption in favour of the thing which is made. There is a deep truth in Milton's remark, that error is only truth in the making, and consequently it is well to pronounce against a custom which is the making of law, in favour of a law which is recognized, acknowledged, and made. Now this doctrine of strict construction is a deference to this presumption. Thus it comes that, although by the custom of Gavelkind an infant of fifteen years may by a deed of feoffment convey away his lands in fee simple, this custom would not be held to entitle him to effect the same thing by any other conveyance. Such a rule is contrary to the common law, and although it having become a rule is an indication that it must have had a reason, the fact that the rule of the common law is different proves that there was a reason for the diverse custom which is thus shown. The rational way of dealing with such a case is to give effect as far as possible to the latent reason which is in both, and hence the rule of construction to which we have alluded. Thus, where there is a custom that lands shall descend to the eldest sister, the courts will not extend the authority of this custom to include an eldest niece (*a*). Where, however, there is a custom in a manor that a man may convey his copyhold in fee simple, that will not be held to preclude him from conveying it for life, for in such a case the lesser right must be held to be included in the greater, and it was therefore here said that, although customs must be strictly, they need not necessarily be literally construed (*b*).

Presumption.

Rule of construction.

The force of customs.

9. No custom can prevail against an Act of Parlia-

(*z*) *Per* Bayley, J., *Richardson* v. *Walker*, 2 B. & C. 839.

(*a*) *Denn* v. *Spray*, 1 T. R. 466; see also *Miggleton* v. *Barnett*, 2 H. & N. 653.

(*b*) Co. Cop. § 33. This limitation of rule is noticed in Coleridge's Blackstone, vol. i. p. 79.

ment (*c*). As we have pointed out, Acts of Parliament must be regarded as the results of custom, as recognitions of practices, and as the worded outcome of observances. To allow a custom to contradict an act would be to suffer a violation of the seventh rule noted above, as it would be the recognition of inconsistent customs. A custom, then, that every pound of butter sold in a particular market-town shall weigh 18 ounces is bad (*d*). In the case of *The Magistrates of Dunbar* v. *The Duchess of Roxburgh* (*e*), it was expressly held that long usage is of no avail against plain statutory enactments, and that such an usage can be binding on parties only as the interpreter of a doubtful law, and as affording a contemporaneous exposition. But that where a statute is expressive as to some points, and silent as to others, usage may well supply the defects if not inconsistent with the express directions of the statute (*f*). These rules and principles will enable the reader to understand what may be called the law of customs in so far as the important question of validity arises in connection with them. But these very rules and principles will be more thoroughly understood after an examination of some cases in which the question has arisen, and when the relation of customs to the law of evidence has been more thoroughly explained and illustrated. Here, however, it is necessary to point out that there has been considerable confusion of thought in relation to the use of the word "custom," and to clear away, if possible, any dubiety which may exist in the mind of the reader. There are customs which really form a part of the common law of the land, and it is with reference

Usage and statutory enactments.

Interpretation by custom.

Confusion as to meaning of "custom."

(*c*) Co. Litt. 113 a; *Noble* v. *Durell*, 3 T. R. 271.

(*d*) *Noble* v. *Durell*, 3 T. R. 271. See American cases, *Walker* v. *The Transportation Co.*, 3 Wall. 150; *Winter* v. *United States*, Hempst. 344. It has been held that in doubtful cases usage may be recurred to, to ascertain the meaning of the Legislature. *Dunbar Magistrates* v. *Duchess of Roxburgh*, 3 C. & F. 335; *Polk* v. *Hill*, 2 Overt. 118, and see *United States* v. *McDaniel*, 7 Pet. 1, 14; *Commercial Bank* v. *Varnum*, 3 Lans. (N.Y.) 86, 90, note.

(*e*) 3 Cl. & F. 335.

(*f*) See D. i. 3, 37.

Custom and common law.

to these customs that the rules of validity, which have been noted above, have been prescribed. But there are many other customs or usages which are not a part of the common law, but which, nevertheless, influence the conduct of men, and which are, it may be, on the way to become chapters of the unwritten rules of the country (*g*). These are as it were provisional laws, but they lack the obligatory character which attaches to proved and recognized customs. These usages are proved by evidence like a fact, and when proved it is held in law to have an obligatory character in relation to certain executed transactions. Its existence will raise the presumption that the parties to a contract acted in conformity with its terms; it will not, however, necessitate any persons who may in the future enter into a similar contract to act in accordance with it, and the obligatory character of its terms may be done away with by the express wish of the parties and by its express exclusion from the contract. There is an habitual law in conformity with which men shape their actions, but that habitual law, which is in a vague conformity with the law of the land, whether statute, common, or customary, is quite insufficient to regulate all kinds of conduct, and so the very habitual practices of men introduces other rules which are sanctioned by the common-sense and convenience of those who are familiar with the transactions. These laws of the people's own making are usages. It is not absolutely necessary that a man should act exactly like his fellows, but as a fact most men in these matters do, for these usages are the results of collective sense and experience (*h*), and just as in an unknown country a traveller will generally find the paths have

Habitual law.

Usages.

(*g*) See the opinion of Nelson, J., in *Allen* v. *The Merchants Bank*, 15 Wend., and note to *The Commercial Bank of Kentucky* v. *Varnum*, 3 Lansing Rep. 94, 95.

(*h*) Earl Russell has well said that a proverb is the wisdom of many and the wit of one, and a custom might be looked on as a sort of factual proverb. It contains in it the common sense and common experience of all men, and it was invented by the ingenuity of one.

considerable shrewdness, and have been planned with a view to ease and convenience, so it is with these customs of trade—these consensual laws. But these customs are not a part of the common law of the land. Although much of the common law of the land has passed through this noviciate in the market place—it being optional whether a person will act in conformity with such a usage —although it is incessant amongst those who execute like transactions, it comes to be a question in many cases whether an individual who has entered into some agreement has done so subject to this common custom or usage. With the customs themselves law has nothing to do. They may come, as we have seen, to be real laws; but while they are only, as it were, vague facts or general facts which have not been judicially recognized, they are of no more interest to the lawyer than particular facts. The only question which can interest him in connection with these is the laws which regulate the admissibility of their proof, and those which regulate the method of proof. The only questions then which we have, as lawyers, to deal with in relation to these usages, are questions of evidence. In recent times a good deal of weight has been given in courts of law to these rabble laws, and a great number of important decisions have been recorded in relation to them, and hence the importance of the subject as a recondite branch of the law of evidence.

Customs not common law.

Evidence.

CHAPTER II.

AS TO CUSTOMS OF THE COUNTRY AND THE ADMISSIBILITY OF THE PROOF OF THESE.

Evidence of usage.

ONE of the most important questions which falls under our consideration in connection with a study of the law of customs is, as to the admissibility of evidence of a usage for the purpose of modifying the meaning of a written contract. This question has to be practically answered upon very many occasions in modern courts of law, and the frequency with which this matter is brought under judicial notice is to be accounted for by our great commercial prosperity, which has increased the extent of our trade, and the energy of those who are employed in it, and has produced an intense vitality in relation to the various conveniences of transaction, which has resulted in many useful and admirable customs which may well become a part of the common law of the land. Whenever a country is progressive its laws tend to improve. But there is one incident of the improvement of a jurisprudence which it is of much importance to note in this place. As a country becomes more civilized its criminal laws become less severe, but, at the same time, its laws of evidence seem to become less strict. Just as there is no necessity for heavy pains and penalties in a country where life and property are respected, where moral principle keeps the hands of the people from violence and from fraud; so in a country where truth is common, where people have become intelligent enough to presume that a lie is always a mistake, there is not the same necessity for the strictness of proof which is felt in a less civilized community. Those

Improvement of law.

who look at the history of our laws of evidence will find ample illustration of the truth of this proposition; and one chapter of that history might be written in connection with the way in which evidence of custom has been admitted in courts of law to annex incident to and to explain the meaning of written instruments. It may be well to divide our subject, for the sake of convenience, into parts. The evidence of usage may annex incidents to contracts between—(1) landlord and tenant; (2) to contracts made in the course of trade; and (3) to other contracts, in transactions which have such regularity of practice as will admit of established usage, and in which, in fact, customs have prevailed.

Division of subject.

First, then, with reference to contracts made between landlord and tenant. It is a well-known rule of the law of proof that parol evidence cannot be admitted to contradict or vary the terms of an agreement in writing (*a*). In case, however, the written agreement is ambiguous—if the ambiguity does not appear on the face of it, in which case it is to be explained by the judge (*b*), but is what is called in law a "latent ambiguity"—parol evidence is admissible to explain what, but for it, would be inexplicable (*c*). The reasons for the admission of parol evidence under such circumstances are clear and strong, but where

Customs of the country.

Parol evidence.

(*a*) *Meres* v. *Ansell*, 3 Wil. 275; *S. P. Ogilvie* v. *Foljambe*, 3 Mer. 53; *Attwood* v. *Small*, 6 C. & T. 232; *Besant* v. *Cross*, 10 C. B. 895; *Caine* v. *Horsfall*, 2 C. & K. 349; *Clifton* v. *Walmesley*, 5 T. R. 564; *Henson* v. *Cooper*, 3 Scott, N. R. 48; *Harnor* v. *Groves*, 15 C. B. 667; *Shore* v. *Wilson*, 9 C. & F. 355; 5 Scott, N. R. 958. See also *Perkins* v. *Young*, 82 Mass. (16 Gray), 389; *Cocke* v. *Bailey*, 42 Miss. 81; *Kirk* v. *Hartman*, 63 Pa. St. 97; and see some earlier cases, such as *Halliday* v. *Hart*, 30 N. Y. 474; *Wolfe* v. *Myers*, 3 Sandf. 7; *Erwin* v. *Saunders*, 1 Cow. 249; *Van Ostrand* v. *Reed*, 1 Wend. 424; *Montgomery County Bank* v. *Albany City Bank*, 8 Barb. 396.

(*b*) *Smith* v. *Thompson*, 8 C. B. 44; 18 L. J. C. P. 314; *Hills* v. *London Gaslight Co.*, 27 L. J. Ex. 60. See also *Campbell* v. *Johnson*, 44 Mo. 247.

(*c*) *Rex* v. *Laindon*, 8 T. R. 379; *Cocker* v. *Guy*, 2 B. & P. 565; *Padlock* v. *Fradley*, 1 C. & J. 90. See, as to the explanation of documents written in illegible hands, *Goblet* v. *Beechey*, 3 Sim. 24; *Masters* v. *Masters*, 1 R. Wms. 424; *Norman* v. *Morrell*, 4 Ves. 769; see also *Howlett* v. *Howlett*, 56 Barb. (N. Y.) 467; *Willis* v. *Fernald*, 23 N. J. L. (4 Vr.) 206; *Suffern* v. *Butler*, 21 N. J. Eq. 410; *De Wolf* v. *Crandall*, 1 Sweeny (N.Y.), 556.

such an ambiguity can be explained by a reference to an existing custom, it is evident that such proof will have more authority than that which would attach to evidence of the party's intentions at the time the instrument was executed, or of his particular practice in relation to certain matters, as indicating what would probably be his intention in framing the document. In all cases it is difficult to arrive at a man's intention; and the only possible means of arriving at a correct conclusion with reference to his mental attitude is by a consideration of his words and actions. These, however, are apt to be misconstrued, even if they are accurately remembered and correctly repeated or described. On the other hand, the practice of all men is easy of proof, and there is the strongest presumption in favour of the supposition that he who wrote the document, the ambiguity of which has to be explained, did what every other body was doing—shaped his conduct according to the manners and usages of his time and district; and in that way, if a usage can be proved, the existence of which will explain the ambiguity, it is evidently the best means of arriving at a conclusion as to the intention of the individual, the explanation of whose agreement is in question. Thus it is that the proof of a custom in the explanation of an ambiguity in a written instrument is not only admitted (*g*), but must be regarded as parol evidence of the highest authority. As a fact, evidence of usage has been admitted, from very early times, in explanation of ambiguous grants and charters, and it has been decided that the construction of such a grant is for the jury and not for the judge (*h*). The real object of evidence under such circumstances is to place the court in the position of the parties to the instrument, and without the evidence

The construction of grants by usage.

(*g*) *Doe* d. *Kinglake* v. *Beviss*, 18 L. J. C. P. 628.

(*h*) *Doe* d. *Kinglake* v. *Beviss*, 18 L. J. C. P. 628; *Beaufort* (*Duke*) v. *Swansea* (*Magistrates, &c., of*), 3 Exch. 413; *Newcastle-on-Tyne* (*Master, Pilots, &c.*) v. *Bradley*, 2 E. & B. 428; *Withnell* v. *Gratham*, 1 Esp. 322; see also *Wadley* v. *Bayliss*, 5 Taunt. 752; but see *Parker* v. *Ibbetson*, 4 C. B. N. S. 846.

of usage that would, in a large number of cases, be impossible (*i*).

In farming leases it is usual for the lessee to covenant that he will manage his farm in a husbandlike manner; but it has been over and over again decided that in the absence of any such covenant the mere relation of landlord and tenant creates an implied obligation to farm according to the custom of the country (*k*). Here, then, we have the terms of the custom becoming a part of or incorporated with the lease. But, as we shall see, an express covenant inconsistent with the custom will control and exclude this implication (*l*).

Wigglesworth v. Dallison.

In the leading case upon this branch of our subject (*Wigglesworth* v. *Dallison*) (*m*), which was an action of trespass for moving, carrying away, and converting to the defendant's own use the corn of the plaintiff, growing in a farm, in the county of Lincoln, of which the plaintiff had been the tenant, it was pleaded by way of replication that within the parish of Hibaldstow, wherein the farm was situated, "there now is, and from time whereof the memory of man is not to the contrary, there hath been, a certain ancient and laudable custom there used and approved of, that is to say, that every tenant and farmer of any lands within the same parish for any term of years which hath expired on the first day of May in any year, hath been used and accustomed, and of right ought to have, take, and enjoy to his own use, and to reap, cut, and carry away, when ripe and fit to be reaped and taken away, his 'way-going crop, that is to say, all the corn growing upon the said

The custom.

(*i*) *Baird* v. *Fortune*, 7 Jur. N. S. 926; *Waterpark* (*Lord*) v. *Fennell*, 7 H. & L. Cas. 650; 7 W. R. 634.

(*k*) *Powley* v. *Walker*, 5 T. R. 373; *Legh* v. *Hewitt*, 4 East, 154; *Angerstein* v. *Hanson*, 1 C. M. & R. 789; *Earl of Falmouth* v. *Thomas*, 1 Cr. & M. 89; *Halifax* v. *Chambers*, 4 M. & W. 662; *Martin* v. *Gilham*, 7 A. & E. 540; *Bickford* v. *Pearson*, 5 C. B. 920; *Wilkins* v. *Wood*, 17 L. J. Q. B. 319; *Sutton* v. *Temple*, 12 M. & W. 52.

(*l*) *Post*, p. 38. *Webb* v. *Plummer*, 2 B. & C. 746; *Clarke* v. *Roystone*, 13 M. & W. 752; *Roberts* v. *Baker*, 1 Cr. & M. 808; *Sutton* v. *Temple*, 12 M. & W. 52, at p. 63.

(*m*) 1 Dougl. 207; 1 Smith's Lea. Cas. (sixth ed.) 539.

lands, which hath before the expiration of such term been sown by such tenant upon any part of such lands not exceeding a reasonable quantity thereof in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish, and which hath been left standing and growing upon such lands at the expiration of such term of years." The jury found the custom in the words stated. An arrest of judgment was afterwards moved, on the ground that such a custom was repugnant to the terms of the deed; and a rule to show cause was granted, and three objections were urged on behalf of the defendants: 1. That the custom was unreasonable; 2. That it was uncertain; 3. That it was repugnant to the deed under which the plaintiff had held. There Lord Mansfield held that the custom was good, and said in words which have been already quoted (*n*):—"It is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown when they knew their interest would expire before they could reap (*o*). But the custom of a particular place may rectify what otherwise would be imprudence or folly" (*p*).

Objections to custom.

Custom as to course of husbandry.

In the case of *Dalby* v. *Hunt* (*q*), which is next, in point

(*n*) *Ante*, p. 21.

(*o*) See 14 & 15 Vict. c. 25, which gives the tenant a right to occupy until the end of the current year of his tenancy, in lieu of emblements.

(*p*) *Beaven* v. *Delahay*, 1 H. Bl. 5; *Boraston* v. *Green*, 16 East, 71; *Caldecott* v. *Smithies*, 7 C. & P. 108; *Griffiths* v. *Puleston*, 13 M. & W. 358.

(*q*) 1 B. & B. 224; see also *Roberts* v. *Baker*, 1 Cr. & M. 808, where the question was whether a covenant in a lease whereby the tenant bound himself not, on quitting the land, to sell or take away the manure, but to leave it to be expended by the succeeding tenant, excluded the custom of the country, by which the outgoing tenant was bound to leave the manure and was entitled to be paid for it. The Court held that it did. In that case Lord Lyndhurst said:—"It was contended that the stipulation to leave the manure was not inconsistent with the tenant's being paid for what was so left, and that the custom to pay for the manure might be engrafted on the engagement to leave it. But if the parties meant to be governed by the custom in this respect there was no necessity for any stipulation, as, by custom, the tenant would be bound to leave the manure, and would be entitled

of time, to that just referred to, a usage for the offgoing tenant of a farm in a particular district to bestow his work, labour, and expense in manuring, tilling, fallowing, and sowing, according to the course of husbandry, and for the landlord to pay him a reasonable compensation in respect thereof, was held a valid and reasonable custom (*r*). Again, in another case, it was held that, although the express terms of a lease cannot be controlled by the custom of the country, if the lease is entirely silent as to the time of quitting, evidence of the custom of the country may be given to fix the time (*s*). These cases indicate under what circumstances a custom may be proved to explain, vary, or extend a written agreement; but the whole subject was so admirably dealt with by Baron Parke, in delivering the judgment of the Court of Exchequer in the case of *Hutton* v. *Warren* (*t*), that we make no apology for using his clear words in this place. In that case it was decided that a custom of the country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled on quitting to receive from the landlord or incoming tenant a reasonable allowance for seeds that are bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord if he will purchase it, was held not to be excluded by a stipulation in the lease under which he held, that he will consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread on the land for the use of the landlord on receiving a reasonable price for it.

Where lease is silent as to time.

Custom as to allowance for seeds.

Stipulation in lease.

In the course of his judgment the learned judge said (*u*): —"It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to

As to commercial transactions.

to be paid for it. It was altogether idle therefore to provide for one part of that which was sufficiently provided for by the custom unless it was intended to exclude the other part."

(*r*) 3 Moore, 536; 1 B. & B. 224.
(*s*) *Webb* v. *Plummer*, 2 B. & A. 746.
(*t*) 1 M. & W. 466; 2 Gale, 71.
(*u*) 1 M. & W. at p. 475.

Principle of admission of custom.

annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions in life in which known usages have been established and prevailed, and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages (*x*). Whether such a relaxation of the strictness of the common law was wisely applied where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have been so long regulated upon the supposition that all customary obligations not altered by the contract are to remain in force that it is too late to pursue a contrary course, and it would be productive of much inconvenience if this practice were now to be disturbed. The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the courts have been favourably inclined to the introduction of these regulations in the mode of cultivation which custom and usage have established in each district to be the most beneficial to all parties.

The policy of this.

Silence of common law.

Away-going crop.

"Accordingly, in *Wigglesworth* v. *Dallison*, afterwards affirmed in a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right, and Lord Mansfield said that the custom did not alter or contradict the lease, but only superadded something to it.

"The question subsequently came under the consideration of the Court of King's Bench in the case of *Senior* v.

(*x*) See *Gibson* v. *Small*, 4 H. of L. Cas. 397, *per* Parke, B.

Armitage, reported in Mr. Holt's Nisi Prius Cases (*y*). In that case, which was an action by a tenant against his landlord for compensation for seed and labour under the denomination of tenant-right, Mr. Justice Bayley, on its appearing that there was a written agreement between the parties, non-suited the plaintiff. The Court afterwards set aside that non-suit, and held, as appears by a manuscript note of that learned judge, that though there was a written contract between landlord and tenant, the custom of the country would still be binding if not inconsistent with the terms of such written contract; and that not only all common-law obligations, but those imposed by custom, were in full force where the contract did not vary them. Mr. Holt appears to have stated the case too strongly when he said that the Court held the custom to be operative 'unless the agreement in express terms excluded it;' and probably he has not been quite accurate in attributing a similar opinion to the Lord Chief Baron Thompson, who presided on the second trial. It would appear that the Court held that the custom operated unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it.

Tenant right.

Custom not inconsistent admitted.

Operation of custom.

"On the second trial, the Lord Chief Baron Thompson held that the custom prevailed, although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it or left at the end of the tenancy, without any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive compensation for seed and labour." After referring to the case of *Webb* v. *Plummer*, the learned judge said, "The question there is, whether, from the terms of the lease now under consideration, it can be collected that the parties intended to exclude the customary obligation to make allowances for seed and labour." And we have already seen how the Court,

Intention to exclude custom.

(*y*) P. 179. See also Woodfall, Landlord and Tenant, p. 989, 10th ed.

through Baron Parke, answered the question (*z*). Some further decisions, although they can scarcely throw more light on the subject after the quotation from Baron Parke's clear and luminous exposition, may illustrate these principles in different aspects, and indicate the extent of their applicability. There is an earlier case than that of *Hutton* v. *Warren* (*a*), which is not referred to in the judgment of the Court. It appeared that a tenant by a clause in his lease was bound, "at his removal, to leave upon the land all the dung and manure of the preceding year, the value to be paid by the succeeding tenant, &c.; and at no time to sell or give away any of the hay or straw of the said farm, which shall always be spent on the ground;" and the point in dispute was whether the tenant under that contract was or was not entitled to take away or sell the straw of the last or 'way-going crop, and whether, if the tenant threatens to sell the straw, the lessor is entitled to have letters of suspension and interdict (*b*). It was held that the custom of the country could have no operation in such a case, as there was a contract with provisions applicable to the point in dispute, and consequently that letters of suspension and interdict might be had and maintained by the lessor (*c*).

Custom of country when inoperative.

If a lease contain no stipulations as to the mode of quitting, the off-going tenant is entitled to his 'way-going crop, according to the custom of the country even although the terms of holding may be inconsistent with such a custom (*d*). Although this might, at first sight, seem repugnant to the doctrine stated above, it will upon examination be found to be in strict conformity with the

Term of holding and operation of custom.

(*z*) See also judgment of Parke, B., in *Sutton* v. *Temple*, 12 M. & W. 52, at p. 63.

(*a*) 1 M. & W. 466; 2 Gale, 71.

(*b*) This was an appeal from a decision of the Court of Session in Scotland to the H. of L.

(*c*) *Roxburgh (Duke of)* v. *Robertson*, 2 Bligh, 156; see also *Hughes* v. *Gordon*, 1 Bligh, 287; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; and *White* v. *Sayer*, Palm. 211.

(*d*) *Holding* v. *Pigott*, 7 Bing. 465.

principle of that doctrine, for the agreement under which the tenant held—in the case in which the above principle was enunciated—was silent altogether as to any terms on which the tenant should quit, and the clause of the agreement which was inconsistent with the custom of the country was a stipulation confined expressly to the period of holding by the tenant. It adverted to nothing that was to take place at the end of the tenancy; and spoke only of terms of holding during its continuance. There was, therefore, nothing in such an agreement at variance with the application of a custom between landlord and tenant which did not come into force until the expiration of the term. In that case, the rights of the landlord and tenant were governed by the terms of the agreement during the tenancy, and by the terms of the custom immediately afterwards. It is clear that, as the agreement only referred to the continuance of the tenancy, both the landlord and tenant must have anticipated not only an end to the holding, but must have looked forward to a time when their mutual relations must be regulated by some other rule than that contained in the agreement. As there is nothing said as to the end, there is the ambiguity of silence which the custom of the country can be called upon to explain.

Reason for its admission in this case.

The custom of the country has frequently been had recourse to for an explanation where the question of the time of a holding has been left in doubt by the written instrument (*e*); and this is clearly within the rules which have been stated above. Thus, where a holding was general from Michaelmas, the custom of the country as to whether that shall be deemed Old or New Michaelmas was held to be admissible in evidence (*f*). Evidence of the custom of the country was held admissible for the purpose of show-

Custom of country as to time.

(*e*) *Martyn* v. *Clue*, 18 Q. B. 661, at p. 682; *White* v. *Nicholson*, 4 M. & G. 95.

(*f*) *Furley* v. *Wood*, 1 Esp. 198; *Hall* v. *Benson*, 4 B. & Ald. 588; but see *Doe* v. *Lea*, 11 East, 312.

Where letting is by deed.

ing that a letting by parol from Lady-day meant from *Old Lady-day* (*g*). In this case the Court referred to the case last mentioned (*Furley* v. *Wood*), and distinguished it from *Doe* v. *Lea* on the ground that the letting was there *by deed*, "which," according to Holroyd, J., "is a solemn instrument, and *therefore* parol evidence was not admissible to explain the expression Lady-day there used, even supposing that it was equivocal." The soundness of this distinction, which seems to have been quite unnecessary in the case, as the contract was by parol, has been called in question. It is certainly difficult to see upon what principle it is founded, for the rule as to the inadmissibility of evidence to contradict or vary the terms of a contract is as applicable to contracts which have no seal as to those which have one. It has, therefore, been argued that it would be rash to infer that parol evidence would be receivable to explain a word of time used in a lease in writing, but not under seal (*h*). In another case, where the defendant avowed the rent payable "at *Martinmas to wit* November 23rd," the plaintiff pleaded *non tenuit*, and a holding from *Old* Martinmas having been proved, the Court thought that the words after the *videlicet* must be rejected as inconsistent with the term Martinmas, which they thought themselves bound by statute to interpret November 11th, that no evidence was admissible to explain the record, and that there was therefore a fatal variance between it and the evidence (*i*). In a Nisi Prius case, Erle, C. J., remarked, "The custom of the country cannot be set up against the legal presumption that Michaelmas means any other day than the 29th September. You must show by direct evidence that this was an Old Michaelmas tenancy" (*k*).

"Martinmas" explained.

In a case where a custom to pay for fallows was proved,

(*g*) *Doe* v. *Benson*, 4 B. & A. 588.
(*h*) Smith's L. Cas. 6th ed. p. 554.
(*i*) *Smith* v. *Walton*, 8 Bing. 238; see also *Kearney* v. *King*, 2 B. & Ald. 301.
(*k*) *Hogg* v. *Berrington*, 2 F. & T. 246.

it was held that there was therefore an implied contract on the part of the landlord, that if there be no incoming tenant, he will pay the outgoing tenant according to the custom (*l*). Again, where, by the terms of a farm lease for seven years expiring at Michaelmas, the tenant agreed to cultivate the land according to the custom of the country, and "during the term to consume with stock on the farm all the hay, straw, and clover grown thereon, which manure shall be used on the farm," and the landlord agreed to let the tenant occupy part of the homestead until Midsummer after the expiration of the term, if necessary, "to end the cropping of the tenant grown on the premises," it was held that the lease did not exclude the custom of the country, by which the tenant having paid for straw on his incoming was entitled to be paid for straw on his quitting (*m*). But where an action was brought by a landlord against an incoming tenant, and the declaration stated that, in consideration that the landlord would give up to the tenant possession of the farm, on which manure had been laid, and would permit him to have the benefit of the manure, he promised to pay the landlord for the same according to the custom of the country, and the breach alleged was non-payment, a written agreement was offered in evidence of the custom, which stated that the land had been manured with eight loads of manure per acre, and that the tenant agreed to leave the land, when given up by him, in the same state or to allow a valuation to be made. Here it was held that the written agreement excluded the custom of the country, as it was inconsistent with it (*n*). A custom not of the country, but prevalent between the owner and tenants of a particular landed estate, is not binding on a tenant who becomes such without notice of its existence (*o*). Where

Custom not excluded by terms of lease.

Agreement excluding proof of custom.

What customs are binding.

(*l*) *Fariell* v. *Gaskoin*, 7 Exch. 273.
(*m*) *Muncey* v. *Dennis*, 1 H. & N. 216.
(*n*) *Clarke* v. *Roystone*, 13 M. & W. 752; *Wiltshear* v. *Cottrell*, 1 E. & B. 674.
(*o*) *Womersley* v. *Dully*, 26 L. J. Exch. 219.

the custom of the country was that the tenant should have the 'way-going crops on the regular expiration of a Lady-day tenancy, the tenant entered on Lady-day, but the tenancy was determined on the 1st of June, it was held that the custom would not operate (*p*). In a case where the plaintiff was a tenant on a farm, with a right to use a certain part of premises until 25th March, after the expiration of the term, and where by the custom of the country the plaintiff was entitled, at the expiration of his term, to be paid by the landlord or the incoming tenant for certain tillages, and he gave up his farm to the defendant as incoming tenant at Michaelmas, 1870, before which date the tillages had been valued. After the defendant had entered into possession, but before the 25th March, 1871, the landlord gave him notice that rent was due from the plaintiff, and required him to pay the amount of the valuation, which was less than the rent due, to him the landlord, and not to the plaintiff, which the defendant did, on receiving an indemnity from the landlord, and without the plaintiff's consent. The plaintiff brought his action for the value of the tillages, and was non-suited. And the Court held that the non-suit was right, for that the contract to be implied between the incoming and outgoing tenant was subject to the right of the landlord to be paid arrears of rent out of the valuation (*q*).

Custom to pay for tillages.

(*p*) *Thorpe* v. *Eyre*, 1 A. & E. 926.
(*q*) *Stafford* v. *Gardner*, 7 L. R. C. P. 242.

CHAPTER III.

AS TO THE USAGES OF TRADE AND THE LAWS OF EVIDENCE RESPECTING THESE.

Usages of trade in commercial contracts.

WE come now to the consideration of the question as to the admissibility of evidence of a usage of trade for the purpose of importing terms into commercial contracts. That this is a question of paramount importance in an industrial age and a commercial country cannot be doubted; but even if there was any hesitation, a consideration of the number of the cases, involving this question, which have come before our courts, and of the deepness and importance of the interests of the litigants in those cases, would prove the assertion. The same preliminary remark which was made in reference to contracts affecting the relation of landlord and tenant as to the general rule as to the ambiguity in contracts would be in place here. That the doctrine of the law as to the admissibility of parol evidence, to explain away or clear up an ambiguity in a mercantile contract, is the same as that which applies to an ambiguity in contracts not made in the way of trade will be evident from the consideration of one or two cases (*a*).

Ambiguity.

General rules as to oral evidence.

There are certain general principles which govern the

(*a*) *Kempson* v. *Boyle*, 3 H. & C. 673; *Bold* v. *Rayner*, 1 M. & W. 343; but see as to inadmissibility, *Smith* v. *Jeffryes*, 15 M. & W. 562; 15 L. J. Exch. 325; *Ford* v. *Yates*, 2 Scott, N. R. 654; 2 M. & G. 549; see Taylor on Ev. (5th ed.) § 1053, p. 996; *Weston* v. *Emes*, 1 Taunt. 115; *Kaines* v. *Knightly*, Sken. 54; *Hoare* v. *Graham*, 3 Camp. 57; *Field* v. *Lelean*, 6 H. & N. 627; 30 L. J. Exch. 170; *Rawson* v. *Walker*, 1 Stark. 361; *Adams* v. *Wordley*, 1 M. & W. 374.

interpretation of all writings which are dealt with at length in all works on the law of evidence. Some of these rules are obvious in their reasons, and necessary in their application. Thus, that the Court must read the whole of a document, and must come to a conclusion as to the meaning of the words used by a careful examination of the context, and the estimate of the sense and weight of the same words in other parts of the instrument (*b*). Words must be understood, if they can, in their primary sense (*c*). Then comes the general rule to which we have adverted (*d*), viz., that parol evidence cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument (*e*).

Collateral agreements.

But this rule does not prevent the parties to the written contract from proving that either contemporaneously or as a preliminary measure they had entered into a distinct oral agreement on some collateral matter (*f*). And, of course, parol evidence is admissible under the proper plea to show that the instrument is altogether void, or never had any legal existence either by reason of forgery or fraud (*g*), or that the contract was made in furtherance of

(*b*) *Blundell* v. *Gladstone*, 11 Sim. 486 ; 1 Phill. 279, 383, 389, *s. c.* ; *Bateman* v. *Lord Roden*, 8 Jones & Lat. 356 ; *Richardson* v. *Watson*, 4 B. & A. 789, 799, *per* Parke, J. ; *Lang* v. *Gale*, 1 M. & S. 11 ; *Walsh* v. *Trevanion*, 15 Q. B. 733, 751.

(*c*) *Robertson* v. *French*, 4 East. 135, 136, *per* Lord Ellenborough ; *Mallan* v. *May*, 13 M. & W. 517, *per* Pollock, C. B. ; *Carr* v. *Montefiore*, 5 B. & S. 408 ; *Ford* v. *Ford*, 6 Hare, 490, 491, *per* Wigram, V.-C. ; *Hicks* v. *Sallitt*, 23 L. J. Ch. 571 ; see also Bell's Com. Law of Scotland (7th ed.), vol. 1, p. 456.

(*d*) *Ante*, p. 33.

(*e*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 64 ; see 2 Ph. on Evid. 350. So by the Scotch law, "a writing cannot be cut down or taken away by the testimony of witnesses."—Tait, Ev. 326, 327. The legislature has also adopted a similar rule, making it obligatory to use writing in evidence of certain dispositions such as wills and other transactions, and those within the Statute of Frauds. See *Fawkes* v. *Lamb*, 31 L. J. Q. B. 98 ; see also *The Reeside*, 2 Sumn. 567 ; *Chubb* v. *Seven thousand eight hundred bushels of oats*, 16 Law Rep. N. S. 492.

(*f*) *Lindley* v. *Lacey*, 17 C. B. N. S. 558 ; see also *Brady* v. *Oastler*, 3 H. & C. 112 ; *Malpas* v. *London & South Western Rail. Co.*, 35 L. J. C. P. 166 ; 1 L. R. C. P. 336.

(*g*) *Collins* v. *Blantern*, 2 Wils. 341 ; 1 Smith's L. C. 310–339, and cases there cited in the notes.

objects forbidden by law (*h*), or was obtained by duress (*i*), or made by persons incapable of contracting (*k*), or that it is not binding through failure of the consideration (*l*).

Subsequent oral agreement.

Any obligation by writing, not under seal, may, in the absence of statutory interference, be either totally or partially dissolved before breach, by a subsequent oral agreement (*m*). Although it has been argued that there is nothing contradictory in the rule that allows a written contract to be totally waived or discharged by parol proof, and that which forbids the reception of parol evidence, with the view of contradicting, varying, adding to, or subtracting from, such an instrument, we confess that it seems to us that the partial dissolution of a written contract seems to be the same thing as subtracting from it, and that the words of Lord Denman, in *Goss* v. *Lord Nugent* (*m*), are contradictory, to a great extent, of the primary rule with regard to parol evidence. These words are:—"After an agreement (at common law) has been reduced to writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, to substract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." We confess that we are unable to reconcile these two doctrines, and that, having in remembrance what Lord Coke calls "the uncertain testimony of slippery memory," (*n*) we would have felt more inclined to adopt

Goss v. *Lord Nugent.*

(*h*) *Collins* v. *Blantern*, 2 Wills. 347; 1 Smith's L. C. 310–326; *Benyon* v. *Nettlefold*, 3 M. & Gord. 94; see also *Briggs* v. *Lawrence*, 3 T. R. 454; *Waymell* v. *Reed*, 5 T. R. 600; *Norman* v. *Cole*, 3 Esp. 253; and see *Martin* v. *Clarke*, 8 R. J. 389.

(*i*) 2 Inst. 482, 483.

(*k*) B. N. P. 172; *Barrett* v. *Buxton*, 2 Atk. 167.

(*l*) *Foster* v. *Jolly*, 1 C. M. & R. 707; *Solby* v. *Hinde*, 2 C. & M. 516; see *Leppoe* v. *National Union Bank*, 32 Md. 136.

(*m*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 65, *per* Lord Denman.

(*n*) 5 Rep. 26*a*.

the rule of the law of Scotland, by which no written obligation whatever can be extinguished or renounced without either the creditor's oath or a writing signed by him (*p*). And we regard the prevailing rule as to the invalidity of the oral dissolution of a statutory instrument as an argument in favour of our proposition (*q*).

Collateral agreements.

Of course, the rule is not infringed by proof of any collateral parol agreement, which does not interfere with the terms of the written contract, although it may relate to the subject matter (*r*); and it must be remembered that the rule is applicable only to suits between the parties (*s*).

General principle illustrated.

The policy of the rule will be the better appreciated, and its nature and scope more thoroughly understood, from a consideration of some of the cases in which parol evidence has been rejected. In this place, any such inquiry, as it is mainly preliminary, must necessarily be short. Where, therefore, a policy of insurance was effected on goods "in ship or ships from Surinam to London," parol evidence was held inadmissible to show that a particular ship which was lost had been verbally excepted at the time of the contract (*t*). And where a policy described the two termini of the voyage, the insurers were not allowed to prove by parol evidence that the risk was not to commence till the vessel reached an intermediate place (*u*). So where a ship was particularly described in

(*p*) Tait on Evidence, 325. In Scotland a written agreement cannot be afterwards waived or varied by mere words, though a subsequent parol agreement, accompanied or followed by part performance, will suffice for that purpose. *Bargaddie Coal Co.* v. *Wark*, 3 Macq. Sc. Cas. H. of L. 467.

(*q*) See Taylor on Ev. § 1045 (5th ed.); *Marshall* v. *Lynn*, 6 M. & W. 116; *Emmet* v. *Dewhirst*, 21 L. J. Ch. 497; *Moore* v. *Campbell*, 10 Exch. 323; *Stowell* v. *Robinson*, 3 Bing. N. C. 928; *Stead* v. *Dawber*, 10 A. & E. 57.

(*r*) *White* v. *Parkin*, 12 East, 578; *Edwards* v. *Bates*, 7 M. & G. 600, 611, *per* Creswell, J.; *Foster* v. *Allanson*, 2 T. R. 479; *Fletcher* v. *Gillespie*, 3 Bing. 635. This and the above provisions have been introduced into the Indian Evidence Act, 1862; see sect. 92; see also The Law of Evidence in British India, by C. D. Field (2nd ed. 1873), p. 316.

(*s*) 1 Poth. on Obl. 4, c. 2, art. 3, n. 766.

(*t*) *Kaines* v. *Knightly*, Skin. 54; *Leslie* v. *De le Torre*, cited 12 East, 583.

(*u*) *Hoare* v. *Graham*, 3 Camp. 57; *Spartali* v. *Benecke*, 10 C. B. 212; *Besant* v. *Cross*, 10 C. B. 895; *Hanson* v. *Stetson*, 5 Pick. 506.

a written contract of sale, parol evidence of a further descriptive representation made prior to the sale was held inadmissible to charge the vendor, without proof, of actual fraud, all previous conversation being merged in the written contract (*y*). These and other cases (*z*) sufficiently illustrate the rule that, although extrinsic parol evidence is inadmissible to vary, add to, or subtract from the contents of a valid written instrument, on the sufficient grounds that the parties to the instrument must be presumed to have committed to writing all that was necessary to give full expression to their intentions and meaning, and that incalculable difficulty, confusion, and mischief would arise if verbal testimony were received in such cases; still it may in all cases be adduced where there is doubt, with the view of explaining the written instrument, that is, for the purpose of enabling the Court to understand the real nature of the contents of the writing before them, by an explication of the terms employed (*a*). And here we find ourselves in a position to consider the laws relating to usage, for it is evident that in considering the meanings of the words used in any document regard must be had to their ordinary use. A dictionary is, after all, only a volume of precedents. But words have not only a common, conversational, and literary meaning, they very often have a technical, a business sense, and in transactions connected with that particular trade or profession there is every probability that the Janus-faced word will be used in its technical sense, and it is there of importance, by means of witnesses conversant with the business, trade, and locality, to which the document relates, to speak as to the particular conventional meaning of the words in question (*b*).

Rule as to extrinsic parol evidence.

Presumption.

Usage in relation to ambiguity.

The meaning of words.

(*y*) *Pickering* v. *Dowson*, 4 Taunt. 779; see *The Isabella*, 2 Rob. Adm. 241; *White* v. *Wilson*, 2 B & P. 116; *Rich* v. *Jackson*, 4 Br. C. C. 514.

(*z*) See Taylor on Evidence (5th ed.), § 1053, 1054, 1055, &c.

(*a*) *Shore* v. *Wilson*, 9 Cl. & F. 355, *per* Parke, B.; 566, 567, *per* Tindal, C. J.; *Kell* v. *Charmer*, 23 Beav. 195; see also *Campbell* v. *Johnson*, 44 Mo. 247; *Perkins* v. *Young*, 82 Mass. 389; *Cocke* v. *Bailey*, 42 Miss. 81; *Ellis* v. *Crawford*, 39 Cal. 523; *Richards* v. *Schlegelmich*, 65 N. C. 150.

(*b*) See Bell's Com. b. 3, pt. 1, ch. 3 (7th ed.), vol. 1, p. 456; see also *per*

The legal principles and usage as evidence.

The principles which have governed the admission of the evidence of usage in such cases have been uniform, but an important question arises as to the expediency of an indiscriminate admission of usages in explanation of written contracts, which has to do with the whole policy of the law; and as the subject is one which by its nature should be considered before entering upon a minute account of the various decisions in connection with the reception of evidence in such cases, this seems the proper place to set out one or two of the opinions which have been expressed upon the subject, and the principles which ought to guide to an answer to this important question. There have been many doubts expressed as to the expediency of the extension of the rule as to the admissibility of evidence of usage. That it was originally admissible only to explain written contracts, that it was used to assist in the rational construction of written instruments, is certain; but it is equally beyond doubt that in many cases it had been admitted to put a construction upon such writings at variance with that which was in the intention of the parties. There are scarcely any questions which come before courts of law so difficult of decision as those involving customs. Here the Court has to deal with something which is vague and indefinite, which bears much similarity to law, but which yet comes before them in the guise of evidence, which is not definitely written in books, but lives only in the breath of the public and the vague traditions of the actions of men. It requires not only legal learning but genius to deal with such cases, and it is not to be wondered at if many of the common law judges shrink from the task of exercising such an indefinite jurisdiction. Lord Campbell, with great sagacity, has pointed out this fact. "Lawyers," he says, "desire certainty, and would have a contract express all its terms, and desire that no parol evidence beyond it should be re-

As to the extent to which usage should be admitted to vary written contracts.

Difficulties of subject.

Lord Eldon, in *Anderson* v. *Pitcher*, 2 B. & P. 164; *Cutter* v. *Powell*, 6 T. R. 320.

ceivable. But merchants and traders with a multiplicity of transactions pressing on them, and moving in a narrow circle and meeting each other, desire to write little and leave unwritten what they may take for granted in every contract. In spite of the lamentations of judges they will continue to do so, and in a vast majority of cases of which courts of law hear nothing they do so without loss or inconvenience, and upon the whole they find this mode of dealing advantageous even at the risk of occasional litigation" (*c*). It is owing to these circumstances that we find many attempts upon the part of judges to limit the extent of the applicability of custom as a means of explaining indefinite writings. We must consider these. In the case of *Hutton* v. *Warren* (*d*) the judges, although they decided in accordance with the authorities cited, clearly indicated that in their opinion the relaxation of the common law in reference to this matter, where formal agreements had been entered into, and especially instruments under seal, was both unwise and unjust (*e*). And Lord Denman, in delivering the opinion of the Court in the case of *Freeman* v. *Loder* (*f*), said:—"If a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive is hardly open to a doubt. He would decide at once that the written contract must speak for itself on all occasions; that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts to write the whole of their contracts, while, in mercantile affairs, no mischief can be greater than the uncertainty produced by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it must have been struck with the

Practice of traders.

Attempts to limit scope of custom.

Written contract to speak.

Dangers of explanatory evidence.

(*c*) See 7 El. & Bl. at p. 279.
(*d*) 1 M. & W. 475; see also *Anderson* v. *Pitcher*, 2 B. & P. 168, *per* Lord Eldon.
(*e*) See *Johnston* v. *Usborne*, 11 A. & E. 557.
(*f*) 11 A. & E. 597, 598.

hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referrring to the written documents. Again, what can be more difficult than to ascertain, as a matter of fact, such a prevalence of what is called a custom of trade as to justify a verdict that it forms part of every contract? Debate may also be fairly raised as to the right of binding strangers by customs probably unknown to them; a conflict may exist between the customs of two different places; and supposing all these difficulties removed, and the custom fully proved, still it will almost always remain doubtful whether the parties to the individual contract really meant that it should include the custom." And the same opinions have been expressed by the late able and learned Mr. Justice Storey (*g*). "I own myself," he said, "no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs often unknown to particular parties and always liable to great misunderstandings and misrepresentations and abuses to outweigh the well-known and well-selected principles of law. And I rejoice to find that of late years the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them (*h*). The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or particular words in a given in-

Difficulty of ascertaining custom.

Habit of late years as to usages.

Loose usages.

The office of a usage.

(*g*) The Schooner *Reeside*, 2 Sumn. 567.
(*h*) See, however, *post*, pp. 51, 86, 87.

strument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usuge or custom to control or vary the positive stipulations in a written contract, and *à fortiori* not in order to contradict them. An express contract of the parties is always admissible to supersede or vary or control a usage or custom, for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom, for that would be not only to admit parol evidence to control, vary, or contradict, written contracts; but it would be to allow mere presumptions and implications properly arising in the absence of any positive expressions of intention to control, vary, or contradict the most formal and deliberate declarations of the parties." As we shall see, however, there has, in more recent times than those to which Mr. Justice Storey referred, been a tendency upon the part of judges to extend the office of a usage, and while they have been as unwilling to allow a usage to rule express words, they have allowed a usage to supply words and incidents to a written contract which were not inconsistent with it. They, too, looked to the intention of the parties, but they came to the conclusion that the real drift of these intentions would be better ascertained by a careful regard to the circumstances of the individual at the time of the contract than from a slavish regard only to the written words of the instrument. The circumstances which it was of most importance to bear in mind, as likely to affect the mental condition of the parties to the instrument, were those common circumstances which are classed under the head course of trade, and which are embodied in what we call usage. It was from this view that the recent extension of the functions of custom has taken place. Bearing, then, these weighed and careful words in mind, we proceed to the consideration of the law, as it has been

Usage not to control positive stipulations.

Modern tendency as to usages.

Intention of parties.

laid down in various cases, which is applicable to the question.

Why parol evidence is admitted.

We must bear in mind that the admission of parol evidence of usage is allowed on a principle of presumption that in many transactions the parties thought it unnecessary to express in writing the whole of the contract they were entering into, but to contract with reference to those known usages (*i*), just as there is an implication that they contracted with a reference to ascertained physical laws. But these usages of trade with reference to which their contract was framed must be understood as something different from the general custom of merchants, which in so far as it is ascertained and recognized is the universal established law of the land, which is, as we have already seen (*j*), to be collected from decisions, legal principles and analogies, and not from evidence. In all cases laws were matters of evidence once upon a time, but when they were proved, ascertained, and acknowledged, they became not matters provable by new evidence, but matters evidenced by past records, and these records resided, for the most part, in the breasts of the judges. The right understanding of the real relation of law and evidence seems to us to be a matter of some importance. Evidence deals with facts, law with human principles as applicable to facts. But rough doing went before rules. Practice has always preceded theory, and in some historical senses evidence must be regarded as the foundation of law. The analogy of language which is closely connected with law,—which might well be regarded as the grammar of conduct,—will help us to understand this connection. It has been pointed out that men used to think of sub-

Law and evidence.

Evidence the foundation of law.

(*i*) *Kirchner* v. *Venus*, 12 Moore, P. C. C. 361.

(*j*) *Per* Foster, J., *Edie* v. *East India Co.*, 1 Wm. Black, at p. 298; *per* Lord Campbell in *Brandão* v. *Barnett*, 3 C. B. 519, at p. 530; *per* Byles, J., *Suse* v. *Pompe*, 8 C. B. N. S. 538, at p. 567; but see *Haille* v. *Smith*, 1 B. & P. 563, in which evidence of the general custom of merchants was received, and *Vallejo* v. *Wheeler*, Lofft, 631, at p. 644; see also *per* Nelson, J., in *Allen* v. *The Merchants' Bank*, 15 Wend. 215.

stantives in action before they reached the abstract conception of a verb; and that such phrases, in the mouths of the vulgar, as "a-going" and "a-coming," at the present time, are indicative of the early use of nouns in the place of verbs. There is an abstractness in expression of action or passion which was only possible to a stage of considerable mental development. But to us there seems to be a close analogy between this relation of nouns and verbs which Hegel has expressed by saying, "It is in names that we think," and the relation which exists between evidence and law. The province of the one is, as it were, substantives of the other verbs. The province of the one is concrete experiences, of the other, abstract generalizations and commands. But, further, we would be inclined to think that just as verbs were at first nothing but modified substantives—or substantives becoming abstract—so laws were at first only evidence modified or becoming abstract. Hence it is that in our estimation custom or usage is the connecting link between law and evidence; hence, also, its importance, not only to the lawyer, but to the scientific jurist.

Illustrated by language.

Usage in relation to law and evidence.

Usages of trade, then, in the sense in which we are using the phrase in this place, are to be discriminated from the general custom of merchants, although in one way they may be regarded as the general custom of merchants in the making. This being so, it is not extraordinary that this distinction has not always been so clearly understood as it is at the present time, and that we find a learned judge in the year 1787 using these words. "Within the last thirty years," Mr. Justice Buller remarked (*k*), "the commercial law of the country has taken a very different turn from what it did before. Before that period we find that, in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury, and produced no established principle. From that time we all know the great study has been to find some certain

Usage of trade and custom of merchants to be distinguished.

(*k*) 2 T. R. p. 73.

general principles which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future."

Particular general customs.

But the distinction which is to be drawn at the present time is clearly between general usages or customs which are laws, and particular usages or customs which are matters of evidence. When, however, they are proved, they engraft terms into a contract in much the same way that a general custom or law would.

Method of proof.

First, then, as to the principle of admissibility, and the method of proof. Seeing that custom is only to be inferred from a large number of individual acts, it is evident that the only proof of the existence of a usage must be by the multiplication or aggregation of a great number of particular instances, but these instances must not be miscellaneous in character, but must have a principle of unity running through their variety, and that unity must show a certain course of business, and an established understanding respecting it (*l*). The force of usage is derived from the habit of mind to expect uniformity in the actions of men, and to anticipate the same conduct under similar circumstances in the future which has been experienced in the past. Were such an anticipation unfounded, custom could have no meaning. But use is second nature, and produces a secondary law well nigh as binding on the thoughts and actions of mankind as the laws of Nature herself. The proof, therefore, of single instances in such cases is all-important, and it has been remarked that witnesses who are called to prove a custom of trade, or the general or prevailing course of business in that calling, should cause their minds to revolve over instances known to them of its having been acted on (*m*). One important particular is to be noted in relation to the evidence given to support

The force of usage.

Elements to be attached to usage.

(*l*) *Mackenzie* v. *Dunlop*, 3 Macq. H. of L. Cas. 22; see also *Kidson* v. *Empire Marine Co.* 35 L. J. C. P. 250; see also *Myers* v. *Dresser*, 16 C. B. N. S. 646.

(*m*) *Hall* v. *Benson*, 7 C. & P. 911.

a mercantile usage, and that is, that it is not necessary to attach to it the elements of antiquity, uniformity, or notoriety, which, as we saw (*n*), were necessary to the admission of a local law, or what is technically called a particular custom. Such a usage "may be still in course of growth" (*o*); it may require evidence for its support in each case, but in the result it is enough if it appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract (*p*). Thus, as we have seen, the "custom of the country" with reference to good husbandry means no more than that the tenant should conform to the existing prevalent usage of the country where the lands lie (*q*), and the general usage of trade may be imported into a contract though the proof has been given of exceptions to such usage (*r*). Evidence, therefore, of a particular usage, to add to or in any manner affect the construction of a written contract is admitted thus only on the principle that the parties who made the contract were both cognizant of the usage, and are presumed to have made the contract in reference to it (*s*). "Many contracts," said Erle, C. J., "in one case are construed by the course of business in the particular trade, or in the particular place where they are made. . . . In the cases where such local usages are imported into the contract, it is because they tacitly form part of it like those contracts in which we find the words, 'and other usual

Growing usage.

Prevalent usage.

Principle of admission.

(*n*) *Ante*, p. 15 *et seq.*

(*o*) *Juggomohun Ghore* v. *Manickchund*, 7 Moore, Ind. App. 263, at p. 282.

(*p*) *Juggomohun Ghore* v. *Manickhund*, 7 Moore, Ind. App. 263; *Legh* v. *Hewitt*, 4 East, 154, 159, *per* Ld. Ellenborough; *Dalby* v. *Hirst*, 1 B. & B. 224; 3 Moore, 536; *Vallance* v. *Dewar*, 1 Camp. 508; but see *Collins* v. *Hope*, 3 Wash. C. Ct. 149; compare *Donnell* v. *Columbian Ins. Co.*, 2 Sumn. 366; *Wilcocks* v. *Phillips*, 1 Wall. Ir. C. Ct. 47.

(*q*) *Legh* v. *Hewitt*, 4 East, 154, 159, *per* Ld. Ellenborough; *Dalby* v. *Hirst*, 1 B. & B. 224, 228.

(*r*) *Vallance* v. *Dewar*, 1 Camp. 508, *per* Ld. Ellenborough.

(*s*) See *Kirchner* v. *Venus*, 12 Moore, P. C. C. 361; 7 W. R. 455; *Meyer* v. *Dresser*, 16 C. B. N. S. 646; *Appleman* v. *Fisher*, 34 Md. 540; *South-western Freight, &c. Co.* v. *Stanard*, 44 Mo. 71.

terms.' They then form part of the contract. The contract expresses what is particular to the bargain, and the usage supplies the rest ' (*t*). As it is only a law in growth, and not in completeness, persons are only *presumed* to be aware of it, as there was no necessity incumbent upon them of informing themselves of the whole of the customs of a trade, as there is upon every subject of becoming acquainted with the whole of the laws of a country. Therefore the presumption may be rebutted (*u*). Thus, where goods were shipped at Liverpool for Sydney, and where by bill of lading the goods were made deliverable to the shipper's order, or assigns, "he or they paying freight for the goods here as per margin," and in the margin the stated amount of freight was made payable in Liverpool to M. (who was not the shipowner), one month after the sailing of the vessel, it was held that, as against an indorsee for value of the bill of lading, the master could not detain the goods at the port of delivery on the ground of non-payment of the freight, although the jury found that by the usage of Liverpool the shipowner does not lose his lien for the freight by making it payable at the port of shipment, and that such a local usage cannot bind a *bonâ fide* holder for value without notice (*x*). But although all the incidents which are necessary to the recognition of a particular custom or local law are not necessary in the case of a usage of trade, still some are; it must for instance be reasonable to be binding, and it has been held that it is not reasonable if an honest or right-minded man would deem it unfair or unrighteous (*y*). It is very evident that this is a necessary incident. Usages are the result of the experience of mankind, and have been planned with a view to their convenience. But nothing absolutely un-

Knowledge of custom presumed.

May be rebutted.

Incidents of a usage.

Usage must be reasonable.

(*t*) *Meyer* v. *Dresser*, 16 C. B. N. S. 646, at 660.
(*u*) See *Southwestern Freight, &c. Co.* v. *Stanard*, 44 Mo. 71.
(*x*) *Kirchner* v. *Venus*, 12 Moore, P. C. C. 361; 7 W. R. 455.
(*y*) *Paxton* v. *Courtnay*, 2 F. & F. 131; see also *Leuckhart* v. *Cooper*, 3 Scott, 521; 3 Bing. N. C. 99; see also *Southwestern Freight, &c. Co.* v. *Stanard*, 44 Mo. 71.

reasonable could result from the former, or tend to produce the latter. The self-will of an individual might make dishonesty or nonsense paramount for a day, but the experience of men never could consecrate what was unrighteous, their convenience and comfort never could be subserved by what was unjust or unreasonable. Where evidence of a usage has been admitted, therefore, evidence may be given in reply, tending to show that such a supposed usage would be unreasonable (*z*). The evidence to establish a custom must be uniform, and even an occasional practice tolerated to some extent, in a certain department of business for any given year, cannot be said to be made out without distinct proof of some specific instances during the period in question (*a*). The usage, to be binding, must be general as to place and not confined to a particular bank (*b*). We have already seen that evidence of a usage of trade is admissible to show that words used in a certain written contract were used in a peculiar, technical, or local sense (*c*); but we must add here, while we are speaking of the kind of evidence which is required to support a usage, that the proof of such a use must be clear and irresistible (*d*).

Evidence of usage.

We come now to an important question, which must be considered in connection with the proof of a custom, and that is as to whether evidence of a custom at a different place is admissible as bearing on the question of a custom at the *locus in quo*. In one case it was distinctly laid down that to prove the manner of conducting a particular branch of trade at one place evidence may be given to show the manner in which the same branch is carried on at another place; Buller, J., remarking, "If it can be

Evidence of collateral customs.

(*z*) *Bottomly* v. *Forbes*, 5 Bing. N. C. 128.

(*a*) *Chenery* v. *Goodrich*, 106 Mass. 566; see also *per* Erle, C. J., in *Myers* v. *Dresser*, 16 C. B. N. S. 646.

(*b*) *Adams* v. *Otterback*, 15 How. 539; but see *Vallance* v. *Dewer*, 1 Camp. 503.

(*c*) *Ante*, p. 47.

(*d*) *Lewis* v. *Marshall*, 7 M. & G. 729; 8 Scott, N. R. 477.

shown that the time would have been reasonable in one place that is a degree of evidence to prove that it was so in another. The effect of such evidence may be taken off by proof of a difference of circumstances. It is very true that the custom of one manor is no evidence of another, that has been determined in many cases (*e*), but the point here is very different; it is a question concerning the nature of a particular branch of trade" (*f*). In another case it appeared that a plea of a custom of trade in London might be supported by proof of a custom prevailing in London and other English ports (*g*). And in the most recent case (*h*), in which the fact that a custom existed in the London fruit trade, that if the brokers did not give the names of their principals in the contract, they were held personally liable, evidence was given as to the existence of a similar custom in the London colonial market. The Court, although it had some doubt, seeing that the case went further than *Noble* v. *Kennoway* (*i*), decided that it was admissible, on the general principle that it would be useful in elucidating the truth (*k*), and because, in the words of Blackburn, J., "it struck me, where the question was, Does a broker in the fruit trade, if he does not disclose his principal's name, incur a personal liability in consequence? that it would be proper evidence for a jury to consider and weigh that such a custom existed in other trades, and that in those other trades the broker did incur a personal liability" (*l*).

Custom of manor.

Custom in fruit and colonial markets.

Again, on this question of evidence from analogy, the case of *Falkner* v. *Earle* (*m*) may be referred to. In that case it appeared that there was a custom of Liverpool of allowing a discount of three months on freights payable

Evidence from analogy of customs.

(*e*) *Anglesey* (*Marquis*) v. *Hatherton* (*Lord*), 10 M. & W. 218.
(*f*) *Noble* v. *Kennoway*, 2 Dougl. 510, at p. 512.
(*g*) *Milward* v. *Hibbert*, 3 Q. B. 120.
(*h*) *Fleet* v. *Murton*, 7 L. R. Q. B. 126.
(*i*) 2 Dougl. 510.
(*k*) *Per* Cockburn, C. J., 7 L. R. Q. B. at p. 130.
(*l*) 7 L. R. Q. B. at p. 134.
(*m*) 3 B. & S. 360; 32 L. J. Q. B. 124.

on all bills of lading from ports in North America; it also appeared that when Texas was annexed to the United States of America in 1846, the custom was in practice extended to ports in that territory, and it was held that this was evidence from which a jury might infer that the custom extended to ports in California after that country was also associated with the United States by annexation.

Effect of custom on written contract.

We come now to the question as to the effect of a custom upon a written contract. We have seen that it may engraft terms upon a written contract, and that it may not contradict such a contract, and hence arises the question which we have here to consider as to what evidence is admissible in such cases, and from a consideration of the many cases which have been decided to come to a definite conclusion as to the exact meaning of the rule of law. It must be remembered that customs, such as we are dealing with here, are always questions of evidence, and hence it arises that the main question for us in this place is as to the admissibility of the evidence which is offered in their support. The rule is that evidence of particular commercial usages is admissible either to add terms to a contract, as in those cases concerning the time for which the underwriters' liability in respect of goods shall continue after the arrival of the ship (*n*), or to explain its terms, as was done in *Ude* v. *Walters* (*o*), where it was shown that the Gulf of Finland, although distinguished by geographers from the Baltic, is not so distinguished by persons in trade, or as in another case, where it was proved that in mercantile usage *good* barley and *fine* barley did not mean the same thing (*p*).

The rule of law.

To explain.

At first in the history of this branch of the science of

(*n*) *Noble* v. *Kennoway*, 2 Dougl. 510; see also *Ougier* v. *Jennings*, 1 Camp. 503, *n.*; see also Law of Scotland, Bell's Com. b. 3, pt. 1, ch. 3.

(*o*) 3 Camp. 16.

(*p*) *Hutchinson* v. *Bowker*, 5 M. & W. 535; see also *Fox* v. *Parker*, 44 Barb. 541; *Collyer* v. *Collins*, 17 Abb. Pr. 467; *Wacher* v. *Quenzer*, 29 N. Y. 547.

evidence we find that there seems to have been some reluctance upon the part of judges to allow usage to do more than explain in cases where there was evident ambiguity. But it soon came to be understood that it was as necessary to allow usage to explain what was purposely not said as what was carelessly ill expressed, and that many persons were purposely reticent of words, as they were aware of the existence of the usage. Hence it came that it was allowed not only to explain but to add a tacitly implied incident to the contract in addition to those which were expressed. First, then, with regard to the supposed explanation of contracts by means of usage.

Usage allowed to add to contract.

Usage defining and explaining.

In such cases, then, evidence of usage is admissible to define and explain the technical, peculiar, or local meaning of the words used, but where the word has two meanings, one common and universal, the other technical or local, it will be necessary to give proof of circumstances which will raise a presumption that the parties intended to use the words in their later rather than in their former relation, unless the fact can be inferred from reading the instrument itself (*q*). Thus the words "inhabitant" (*r*), "level" (*s*), as understood by miners; "thousand" (*t*), as applied to rabbits on a warren; "weeks," as used in a theatrical contract (*u*); "months," as meaning calendar months in a charter party (*x*); "days," as meaning working days in a bill of lading (*y*); "fur" (*z*), "corn" (*a*), "pig iron" (*b*),

Meaning of words explained.

(*q*) *Shore* v. *Wilson*, 9 Cl. & F. 355; see also *Att.-Gen.* v. *Drummond*, 1 Dru. & War. 353; *Drummond* v. *Att.-Gen.* 2 H. of L. Cas. 837.
(*r*) *R.* v. *Mashiter*, 6 A. & E. 153.
(*s*) *Clayton* v. *Greyson*, 5 A. & E. 302.
(*t*) *Smith* v. *Wilson*, 3 B. & Ad. 728.
(*u*) *Grant* v. *Maddox*, 15 M. & W. 737; see *Myers* v. *Sarl*, 30 L. J. Q. B. 9; 3 E. & E. 306.
(*x*) *Jolly* v. *Young*, 1 Esp. 186, recognized in *Simpson* v. *Margitson*, 11 Q. B. 32.
(*y*) *Cochran* v. *Retberg*, 3 Esp. 121.
(*z*) *Astor* v. *Unions Ins. Co.*, 7 Cowen, 202.
(*a*) *Mason* v. *Skurry* and *Moody* v. *Surridge*, Park, Ins. 245; *Scott* v. *Bourdillion*, 2 N. R. 213.
(*b*) *Mackenzie* v. *Dunlop*, 8 Macq. Sc. Cas. H. of L. 26.

"freight" (*c*), "salt" (*d*), and other words (*e*) and phrases, which presented at first sight no ambiguity, have been interpreted by extrinsic evidence of usage.

Phrases explained by usage.

In very many cases words and phrases which, if interpreted in their ordinary dictionary sense, would cause an instrument to be ambiguous or meaningless, may be read in connection with proof of a usage, so as to make the written contract perfectly intelligible. This has been repeatedly done in courts of law. Thus the word "privilege" has been read with the meaning attached to it by the mercantile part of the nation (*f*). So where a founder of a charity had in a deed of grant described the objects of her munificence by the words "Godly preachers of Christ's Holy Gospel," and upon the interpretation difficulty arose as to the real meaning of that designation, extrinsic evidence, to prove that at the time of the grant there was a sect who were in the habit of calling themselves by that name, was admitted (*g*). "Mauritius" has been held, according to mercantile acceptation, to be an "Indian island" (*h*). And "Amelia Island" was held to denominate a region in which "Tiger Island" is comprehended, and the strict sense of the word was departed from because of the looseness of the ordinary use of these words, a use which was compared to the common and inexact

(*c*) *Peisch* v. *Dickson*, 1 Mason, 11, 12 ; *Gibson* v. *Young*, 2 Moo. 224.

(*d*) *Journée* v. *Bourdieu*, Park, Ins. 245.

(*e*) See *Symonds* v. *Lloyd*, 6 C. B. N. S. 691 ; see *Lewis* v. *Marshall*, 7 M. & G. 729, 738 ; *Lucas* v. *Groning*, 7 Taunt. 164 ; *Robertson* v. *Jackson*, 2 C. B. 412 ; *Lethulier's case*, 2 Salk. 443 ; *Miller* v. *Tetherington*, 6 H. & N. 278 ; *Kidson* v. *The Empire Marine Ins. Co.*, 1 L. R. C. P. 535 ; 35 L. J. C. P. 250 ; *Myers* v. *Sarl*, 30 L. J. Q. B. 9 ; *Taylor* v. *Briggs*, 2 C. & P. 525 ; *Gorrissen* v. *Perrin*, 27 L. J. C. P. 29 ; *Bold* v. *Rayner*, 1 M. & W. 343 ; *Spicer* v. *Cooper*, 1 Q. B. 421 ; 1 G. & D. 52 ; *Bowman* v. *Horsey*, 2 M. & Rob. 85, *per* Ld. Abinger ; *Johnston* v. *Usborne*, 11 Cl. & F. 549.

(*f*) *Birch* v. *Depeyster*, 1 Stark. 210 ; 4 Camp. 385.

(*g*) *Shore* v. *Wilson*, 9 Cl. & F. in 355, 580, *per* Ld. Cottenham ; see also *Att.-Gen.* v. *Drummond*, 1 Dru. & War. 353 ; and on App. 2 H. of L. 837.

(*h*) *Robertson* v. *Clarke*, 1 Bing. 445, at 451 note; *Trueman* v. *Loder*, 11 A. & E. 600 ; *Milward* v. *Hibbert*, 3 Q. B. 135 ; *Vallance* v. *Dewar*, 1 Camp. 503 ; *Ougier* v. *Jennings*, 1 Camp. 505, 506, *n.* ; *Kingston* v. *Knibs*, 1 Camp. 508, *per* Ld. Ellenborough ; *Godts* v. *Rose*, 17 C. B. 229.

employment of the words London and Westminster (*i*). The phrase, "warranted to depart with convoy," was literally construed according to the usage amongst merchants (*k*). "Mess pork of Scott and Co." has been held to mean mess pork manufactured by Scott and Co. (*l*). And in another case, the words "Received on account of Bowman and Lay for J. Mackinson," the words "for J. Mackinson," being ambiguous, were explained by the evidence of a usage of trade which was admitted at the trial (*m*). An invoice, worded to sell goods at "£2 10*s*. per cent. monthly," may be explained by parol evidence, showing the meaning of the words in their ordinary employment by persons in the trade (*n*). So also such evidence may be introduced to show that a person whose name appears at the head of an invoice as vendor is not in fact a contracting party (*o*).

In relation to receipt of goods.

"Days."

Where there was a clause in a bill of lading, that cargo should be taken out in a certain number of days, or that demurrage should be paid, evidence of usage was admitted to prove that days as used meant working days, and not running days (*p*). In another case, the phrase "pitch pine timber" was explained by usage (*q*), and the same evidence was admitted in the case of *Bold* v. *Rayner* (*r*), to explain a variance in the bought and sold notes exchanged over the bargain.

Pitch pine timber.

(*i*) *Moxon* v. *Atkins*, 3 Camp. 200.
(*k*) *Lethulier's case*, 2 Salk. 443.
(*l*) *Powell* v. *Horton*, 2 Bing. N. C. 668.
(*m*) *Bowman* v. *Horsey*, 2 M. & Rob. 85.
(*n*) *Schreiber* v. *Horsley*, 11 Jur. N. S. 675.
(*o*) *Holding* v. *Elliott*, 5 H. & N. 117.
(*p*) *Cochran* v. *Retberg*, 3 Esp. 121. As to meaning of "loading in turn," see *Robertson* v. *Jackson*, 2 C. B. 413; see also *Schultz* v. *Leidmann*, 14 C. B. 38; *Hudson* v. *Clementson*, 18 C. B. 213; as to evidence of a usage to pay an agent, *Hutch* v. *Carrington*, 5 C. & P. 471; for a factor to sell in his own name, *Johnston* v. *Usborne*, 11 A. & E. 549; as to renewal of commission to introducing broker on every renewal of charter effected through him, *Allan* v. *Sundius*, 1 H. & C. 123; 31 L. J. Exch. 307.
(*q*) *Jones* v. *Clark*, 2 H. & N. 725; see also *Vallance* v. *Dewar*, 1 Camp. 503; *Robertson* v. *French*, 4 East. 130.
(*r*) 1 M. & W. 343: see also *Field* v. *Lelean*, 6 H. & N. 617; *Fawkes* v. *Lamb*, 8 Jur. N. S. 385; 31 L. J. Q. B. 98.

Explanation by usage.

Again, in another case, where the principle of the admission of technical evidence was approved of, it was said the words, "Sail from St. Domingo in the month of October," were to be understood, when taken in connection with the usage of the trade, as indicating that the ship would not sail until the 25th (*s*). It is evident that plain words have a stronger presumption in their favour than ambiguous ones, and therefore it has been laid down that, when it is sought to vary the meaning of such words, the evidence of custom should be very strong (*t*). A case which has interest, as it indicates the actual abrogation of a right by a custom, may be mentioned here. The court decided in that case that a shipwright in the river Thames has no lien on a ship taken into his dock to be repaired unless there is an express agreement to that effect, credit being given by the usage of trade to the owner of the ship for the cost of the repairs (*u*).

Lien abrogated by usage.

Usage in relation to bill of lading.

Where, by a bill of lading of wool from Odessa, freight was to be paid in London on delivery, at the rate of "80*s.* per cwt., gross weight, tallow and other goods and grain or seed in proportion as per London Baltic printed rates," it was held that extrinsic evidence was admissible to show that, by the usage of the trade, the meaning of the bill of lading was that 80*s.* per cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured (*x*).

Usage in relation to sale of hops.

"Bale," meaning of.

"Wet" oil.

Again, in the hop trade, "sold 18 pockets Kent hops at 100*s.*" means 100*s.* per cwt. (*y*). A bale in the gambier trade means a compressed package weighing on the average 2 cwt. (*z*). And it appears that by usage oil is "wet"

(*s*) *Chaurand* v. *Angerstein*, 1 Peake, 61; see also *Yates* v. *Duff*, 5 C. & P. 369.

(*t*) *Lewis* v. *Marshall*, 7 M. & G. 729; 13 L. J. C. P. 193.

(*u*) *Mitchell* v. *Raitt*, 4 Camp. 146; see also *Donaldson* v. *Foster*, Abbott on Ship, pt. 4, ch. 1, s. 6. Such a usage will require to be clearly and uniformly well known and understood among the parties, *Davis* v. *New Brig*, 9 Gilp. 473.

(*x*) *The Russian Steam Navigation Co.* v. *Silva*, 13 C. B. N. S. 610.

(*y*) *Spicer* v. *Cooper*, 1 Q. B. 424.

(*z*) *Gorrissen* v. *Perrin*, 2 C. B. N. S. 681.

"About," meaning of.

"London."

if it contains any water, however little (*a*); that "about" so many quarters has, as used in a delivery order, a definite connotation (*b*); that "London" may be used in various senses (*c*); and that the article called "Calcutta linseed" may contain 15 per cent. of tares, rape, and mustard, without losing its right to the appellation "Calcutta linseed," and that on the ground that, although the admixture of foreign substance is considerable, it is not sufficient to deprive it of its distinctive character, and that there is a usage that it should pass in the market under that name.

Sporting usage.

In a memorandum as to a race, the run described was "four miles across country," and it was proved that in sporting parlance these words did not allow the riders to go through gates (*d*). Thus custom may say that on an agreement for a lease the lessor prepares and the lessee pays for the instrument (*e*), although the general rule as to the sale of property is that the vendee, who bears the expense of the conveyance, should prepare it (*f*). In the *North Staffordshire Railway Co.* v. *Peek* (*g*) the majority of the Court held that the terms in a letter to carriers of goods from their customers, "Please send the marbles *not insured*," were to be read "according to the understanding of the language between carriers and their customers," and in that light they were interpreted to convey a request to carry the marbles at the owner's risk. This decision, which was upon the construction of the 7th section of the Railway and Canal Traffic Act (17 and 18 Vict. c. 31), was

(*a*) *Warde* v. *Stewart*, 1 C. B. N. S. 88.
(*b*) *Moore* v. *Campbell*, 10 Exch. 323.
(*c*) *Mallan* v. *May*, 13 M. & W. 511.
(*d*) *Evans* v. *Pratt*, 3 M. & G. 759; 4 Scott, N. R. 370.
(*e*) *Grisell* v. *Robinson*, 3 Bing. N. C. 11.
(*f*) *Price* v. *Williams*, 1 M. & W. 6; *Poole* v. *Hill*, 6 M. & W. 835; *Stephens* v. *De Medina*, 4 Q. B. 422; but see *The Duke of St. Albans* v. *Shore*, 1 H. Bl. 274; *Doe d. Clarke* v. *Stillwell*, 8 Ad. & E. 645; *Hallings* v. *Counard*, Cro. Eliz. 517. In the case of a settlement of personal property the practice is for the lady's solicitor to draw the settlement on marriage and for the husband to pay for it. *Helps* v. *Clayton*, 17 C. B. N. S. 553.
(*g*) 10 H. of L. Cas. 473; 9 Jur. N. S. 914; 8 L. T. N. S. 768.

reversed in the House of Lords. So usage has been allowed to show that "particular average" does not include expenses of recovering or preserving the subject-matter of insurance on the ground that it would not contradict the express terms of the policy (*h*). Particular average.

It is a most difficult thing to distinguish those cases which have been decided on the ground that the usage explained the writing from those which have been looked upon as adding terms or incidents to it. Where only half a thing is expressed, there is real ambiguity in the writing, which can only be fully explained by the addition of a term or incident. Where there is palpable ambiguity, the effect is the same; the addition of a term or the explanation of the terms which are there written gives a meaning to the writing, which it did not possess without this expert evidence. One or two more cases which seem to fall under the first of these two heads may be alluded to in this place. In a case where—by a contract under seal, by which the plaintiff contracted to build for the defendant a house and premises—it was provided that "no alterations or additions should be admitted, unless directed by the defendant's architect by writing under his hand, and a weekly account of the work done thereunder should be delivered to the architect every Monday next ensuing the performance of such work," it was held, that in an action on the contract parol evidence was admissible to show that by the usage of the building trade, "weekly accounts" meant accounts of the day work only, and did not extend to extra work capable of being measured (*i*). Some important words were used in the judgment on this case by Mr. Justice Blackburn:— As to ambiguity and addition of terms. Meaning of weekly accounts in building trade.

"The decision of this case turns simply upon the point —that the words of the written contract are to be understood in that sense which the phrase has acquired in the trade with regard to which it is used. It is the *primâ* How words are to be understood.

(*h*) *Kidson* v. *The Empire Marine Ins. Co.* 35 L. J. C. P. 250.
(*i*) *Myers* v. *Sarl*, 30 L. J. Q. B. 9; 7 Jur. N. S. 97.

Presumption.

facie presumption that it was the intention of the parties to use it in that sense, and having expressed themselves in a written contract making use of the phrase, it is *primâ facie* as a matter of construction of the contract to be taken that they used the phrase in the particular limited sense which it has acquired in the trade. That peculiar and limited sense, if such an one had been acquired, must be shown by parol evidence; and this having been shown, then the presumption is that that was the sense in which the parties making the contract used it. I do not think that in order to introduce this extrinsic evidence it is necessary that the phrase should be at all on the face of it ambiguous".

Peculiar sense how shown.

In *Robertson* v. *Jackson* (*k*), where it was stipulated in the charter-party that the ship should be unloaded, weather permitting, at a certain rate per diem, to reckon from the time of the vessel being ready to unload and "in time to deliver," it was held that the charterers had a right to prove that the contract was entered into with reference to a known and recognised use of the words, "in time to deliver," among persons conversant in the trade.

Usage explaining contract.

The principle was given effect to in another case (*l*), in which by charter-party the defendant agreed to load on board a vessel at Trinidad "a full and complete cargo of sugar, molasses, $\frac{\text{and}}{\text{or}}$ other produce." It appeared that it was the custom at Trinidad to load sugar in hogsheads and molasses in puncheons, in which mode they were carried more conveniently and with less loss to the merchant, and that a full and complete cargo of sugar and molasses meant a cargo so packed; it was held, both in the Court of Exchequer and Exchequer Chamber, that the custom was admissible in evidence, for it was applicable to such a charter-party, and did not control, but

(*k*) *Robertson* v. *Jackson*, 2 C. B. 412; 15 L. J. C. P. 28; see also *Schultz* v. *Liedemann*, 14 C. B. 38; 18 Jur. 42; 23 L. J. C. P. 17.
(*l*) *Cuthbert* v. *Cumming*, 10 Exch. 809; affirmed 11 Exch. 405.

only explained the contract, which ought to be construed with reference to the usage at the port of lading; and it was further decided that the custom was reasonable and good in law.

Undefined words in contract.

In another case which fell within the principle of that last referred to, the plaintiffs sold to the defendant "50 tons best palm oil, expected to arrive" "per the *Chalco*," "at £40 10*s*. per ton," "net duty, and inferior oil, if any, at a fair allowance." The oil on arrival was found to contain only one-fifth of the best oil, and the defendant refused to accept, whereupon the plaintiff brought his action. It was a question as to what was the intention of the parties, and it was taken that in entering into the contract, they had purposely left undefined what was to be the proportion of "wet, dirty, and inferior oil." As Erle, J., remarked, "They were both engaged in the palm oil trade, and would be aware that there was great doubt as to the proportions of good and inferior oil in each cargo; and, therefore, they may well have made the contract on the understanding that such portions should not be specified." There was one established usage in the palm oil trade as to what proportions would satisfy a contract to deliver "best" palm oil, and evidence of this usage was admitted to explain what was left undefined in the contract (*m*). So, where by a contract made at S., between A., who resided in that place, and B., who resided in London, B. sold to A. a cargo of St. Giles Marias wheat, free on board at a French port. The grain was unknown at S., but was shown to be known elsewhere in the trade to contain a mixture of barley. But, although such evidence was offered at the trial, the judge refused it, unless it could also be shown that the fact was well known at S. This ruling was held to be erroneous (*n*). In all these cases we have seen usage explaining or eking out the meaning of written contracts. In all it might be pre-

Usage eking out meaning.

(*m*) *Lucas* v. *Bristowe*, E. B. & E. 907.
(*n*) *Ryder* v. *Woodley*, 10 W. R. 294.

sumed that the usage which was admitted in evidence was present to the minds of the parties at the time they contracted. The very nature of the contracts led to the presumption. Still there was nothing which was palpably ambiguous, and if there had been no custom the contracts could in most of the cases have been read without bringing about any absurdity in meaning, without the interpolation of the terms which these usages had the effect of adding. Thus, "pitch-pine timber" might have been understood as a general term applicable to all kinds of that wood which come from Central America, and as inclusive of that of even Darine, and not limited to the meaning that the phrase had at Savannah. "Weekly accounts" might have been understood as meaning accounts for the extra as well as the days' work; and so with the rest. In most, there was no patent ambiguity upon the face of the contract; it is only a knowledge of the usage which introduces the doubt as to what was really meant. Under these circumstances, we confess we scarcely understand the decision in *Cockburn* v. *Alexander* (*o*). In that case it appeared that a ship was chartered to bring home a cargo of wool, tallow, bark, and other legal merchandise. The bark was not to exceed 50 tons, the tallow and hides not to exceed 80 tons, and "to deliver the same on being paid freight as follows:—For wool, one penny-halfpenny per pound, and one penny-halfpenny and one-eighth of a penny per pound impressed," for the other three articles separate rates were fixed, and the captain was to sign bills of lading at any rate of freight without prejudice to the charter-party. The ship returned with a full cargo, consisting of a small portion only of wool, and the residue tallow, bark, hides, and other legal merchandise. Now, here it was held that there was no ambiguity upon the face of the charter-party to admit parol evidence for the purpose of showing who was to pay for pressing any wool that might be shipped. The Chief Baron

No ambiguity.

Ambiguity introduced by usage.

Ambiguity necessary to admit proof.

(*o*) 6 C. B. 791; 17 L. J. C. P. 74.

(Wilde) used these words in the course of his judgment:—"There being nothing, therefore, on the face of the contract to raise any doubt or ambiguity that requires to be removed or explained, it is not a case in which parol evidence was admissible" (*p*). But might not such proof have been written into the written contract without making it nonsensical or inconsistent with itself, and is not that the true test of its admissibility? Does not the knowledge that there was such a usage in this case, just as in the others, introduce an ambiguity from the fact that the written contract does not say enough? To us there seems nothing in the nature of this contract which should have been regarded as impliedly excluding such proof. We can quite understand that such an implication may arise. We know that it is only in trades which have a settled course of business that usages can exist; if, therefore, a transaction, even although in the course of such a trade, deviated from the ordinary course of that trade—if it was unusual in any of its incidents, then the presumption that the parties had been acting in the light of ordinary custom would not arise, but a presumption of a contrary nature would be the ruling thought. This principle has been given effect to. A, a shipbroker, engaged with a shipowner to have a full cargo for the ship, the rates of freight for which would average 40*s.* per ton, and at least nine cabin passengers, passage-money to average £75. The contract was fulfilled as to the cabin passengers, but the average rate of freight for goods put on board by A amounted to 32*s.* only per ton; he shipped on board, however, several steerage passengers for the voyage, the passage-money paid by whom, after deducting the expense of their diet, &c., when added to the freight of the cargo properly so called, made the average earnings of the whole ship per ton amount to more than 40*s.* It was held that as the contract was an unusual one, the

Where usage can arise.

Unusual contract.

(*p*) 6 C. B. 813.

evidence was not admissible to show that the terms "cargo" and "freight" used with reference to the voyage on which the ship was engaged would, by the general usage and course of the trade be considered to comprise steerage passengers, and the net profit arising from their passage money (*q*).

Before leaving the subject of glossarial usages, as they might be called, we may mention the case of *Bowman* v. *Horsey*, (*r*), in which it was decided that evidence of usage of trade is admissible to show the meaning of ambiguous words in a packer's receipt of goods.

Ordinary parol evidence and usage.

With the view of showing the distinction which exists between ordinary parol evidence and evidence of usage, we think it well to prefix two cases in which the admissibility of the former in relation to written records of transactions has been the subject of judicial decision.

Rules as to parol evidence.

In an action of assumpsit by the drawer against the acceptor of two bills of exchange payable respectively six and twelve months after date, the plea set forth an agreement (not stated to be in writing) between the plaintiff and the defendant, by which, before the making of the bills, it was agreed that the defendant should be discharged from all liability in an action commenced against him by the plaintiff on a promissory note on his paying the plaintiff the costs of such action, and a certain sum of money, and accepting the bills of exchange in question—in case the plaintiff should recover in another action brought by him against another party, on a promissory note given under similar circumstances to the defendants, and that until he should so recover, or if he should not so recover, he should not call for payment of the bills of exchange, and the plea averred that the defendant accord-

(*q*) *Lewis* v. *Marshall*, 7 M. & G. 729. In the report of the case the editors have added the following note: "In construing as *usual* mercantile contract the question would seem to be in what sense have the terms been used in similar contracts. In the case of an *unusual* contract, have the terms acquired any and what peculiar meaning in general mercantile language or in the particular trade?" p. 745.

(*r*) 2 M. & Rot. 81.

ingly paid the costs and money agreed for, and accepted the bills of exchange in question, and that the action against such third party was still undetermined, it was held on demurrer that the plea was had in as much as the defendant could not vary the absolute contract entered into by the bills of exchange by a contemporaneous oral contract inconsistent with it (*s*). Here then we have a direct authority, and although the evidence tendered in that case was not of a usage but of another contract, the rule and principle are the same in both cases. Thus where A., a broker, employed by B. to sell certain railway shares, agreed with C., D.'s broker, to sell him fifty shares, of which A. afterwards informed his clerk at his office, who made an entry in the book as of a sale from A. to C., and a contract note to the same effect was sent to C. A. subsequently saw the entry in the book and altered it by writing the name of B. as seller. Another note was accordingly sent the same evening or the next morning to C., but C. received them both together the next morning. C. did not return the first note, nor did A. request to have it returned. In an action brought by D. against A., for breach of the agreement in not completing the sale, the learned judge who tried the cause left it to the jury to say whether the second note was a correction of a mistake in the first, and told the jury that if the defendant entered into a written contract in his own name, he could not afterwards set up that he was acting as a broker merely, and that although known to be a broker, if he signed the contract in his own name, he was liable, and it was held that this was no misdirection, and further that evidence that it was the custom in Liverpool to send in brokers' notes without disclosing the principal's name, was properly rejected (*t*). As to usage.

We come now to a consideration of those cases in which Classification.

(*s*) *Adams* v. *Wordley*, 1 M. & W. 374; see *Menzies* v. *Lightfoot*, 19 W. R. 578; 11 L. R. Eq. 459; 4 L. J. Chan. 561.
(*t*) *Magee* v. *Atkinson*, 2 M. & W. 440.

incidents or terms have been added to written contracts by proof of usage. We have pointed out that the distinction which we have here made is one rather in fancy than in reality, but no other distinction seemed to offer hope of better method. The classification of the principles of admissibility of usage on the basis of the different trades or callings in which these factual laws were formed, or on the basis of the different instruments in the interpretation of which usages were admitted, had nothing to recommend it, although it has been adopted by Mr. Fisher in his "Digest." Indeed it was wrong in principle and misleading in result. The mere fact that the usages were in themselves different would be as intelligible a ground of classification as the one alluded to. There can be no reason for differentiating usages because the one explained the meaning of a technical word in a brewer's invoice, and the other another word of doubtful meaning in the bought and sold notes of a stock exchange transaction. It is the legal principles which are to determine the admissibility or inadmissibility of these in courts of law which ought to be made the ground of their association in one class rather than their intrinsic difference as facts. There was therefore no really scientific classification possible. We proceed then to the statement of the principles of some of the decisions.

Principle of.

Usage adding incident.

In the case of Browne *v.* Byrne (*u*), which was an action for freight by a shipowner against the indorsee of a bill of lading, to whom goods had been delivered at Liverpool, and who had accepted them, the bill of lading making them deliverable, "he paying freight for them five-eighths of a penny sterling per pound, with £5 per cent. primage and average accustomed," it was held that evidence was admissible, that by the custom of Liverpool the shipowner was entitled to a deduction of three months' discount from the freight, though such custom applied only to goods coming from ports in the Southern States of America.

(*u*) 3 E. & B. 703; 18 Jur. 700.

In this case we find that a term not expressed in the bill of lading is added to it by the custom of Liverpool. Some see the apparent terms of a contract varied in *Spartali* v. *Benecke* (*v*), where in a contract for the sale of thirty bales of goats' wool, containing the following stipulation: "Customary allowance for tare and draft to be paid for by cash in one month, less 5 per cent. discount," evidence was allowed to show that by a usage of trade vendors are not bound under similar contracts to deliver wool without payment, and it was said that such a usage sought to annex to the contract an incident not inconsistent with its terms.

Contract varied.

Again, in *Field* v. *Lelean* (*x*), evidence of a usage amongst brokers that on the sales of mining shares the seller is not bound without contemporaneous payment was held admissible to show that the defendant was not entitled to have the shares which he had bought from the plaintiff delivered to him before payment, although by the bought and sold notes payment of the price was to be made, half in two, half in four months, and nothing was there said as to the time of delivery (*y*). In that case it was argued that the case of *Spartali* v. *Benecke* (*z*) was directly in point in favour of the defendant, and Williams, J., in his judgment said, "It may be observed that in that case, although the written instrument of sale was *mutatis mutandis*, the same substantially as in the present, the usage relied on was different. In the present it was simply that the delivery is to take place at the appointed time for payment, and not before. In *Spartali* v. *Benecke*, the usage relied upon was that the delivery was to be at the option of the buyer, and that he might require it at any time before the appointed day of payment, but in no case without payment of the price.

Time of payment.

Usage vary by time of payment.

Cases reconciled.

(*v*) 10 C. B. 212.
(*x*) 30 L. J. Exch. 168, Exch. Cham. 6 H. & N. 617.
(*y*) See *Godts* v. *Rose*, 17 C. B. 229.
(*z*) 10 C. B. 212; 19 L. J. C. B. 293.

Therefore it was a case where I apprehend that Wilde, C. J., in his judgment treated the usage as varying the time for payment expressed in the statement of the contract; inasmuch as according to that usage the delivery intended by the contract might take place so as to give the seller a right to call for payment before the time specified in the written instrument. But according to the usage proved in the present case, no delivery can be required or is intended to take place before that time arrived. If *Spartali* v. *Benecke* cannot be distinguished in this way, I agree it ought to be overruled."

Warranty modified by usage.

Again, where a horse had been sold by private contract at a repository with a written warranty of soundness, and the purchaser afterwards brought an action against the seller, on account of the unsoundness of the horse. The defendant was permitted to show that by one of the printed regulations hung up at the repository, warranties were only to remain in force till twelve o'clock on the day after the sale, and then upon further proof that the plaintiff was aware of this regulation, and yet made no complaint within the limited time, a nonsuit was directed to be entered (*a*).

As to amount of payment.

Where there was a custom that the yearly hiring of a clerk is determinable by a month's notice at any time, it was held that such a custom was not inconsistent with a provision in the agreement, that at the end of the year the employer, if satisfied with the amount of business done, would make an addition of £30 to the stipulated salary (*b*). Where the agreement in writing contained these words, "to serve B. from 11th Nov., 1815, to 11th Nov., 1817," at certain wages, "to lose no time on our account, to do our work well, and behave ourselves in every respect as good servants," it was held that it was capable of explanation by usage in the particular trade

(*a*) *Bywater* v. *Richardson*, 1 A. & E. 508; see *Smart* v. *Hyde*, 8 M. & W. 723; *Foster* v. *Mentor Life Assurance Co.* 3 E. & B. 48.
(*b*) *Parker* v. *Ibbetson*, 4 C. B. N. S. 346; 27 L. J. C. P. 236.

for servants, under similar contracts to have certain holidays and Sundays to themselves (*c*). And in a somewhat similar case where the plaintiff had agreed in writing to perform at the defendant's theatre, and the defendant agreed to engage her for three years, and pay her a certain weekly salary, evidence was admitted to show that there was a uniform usage in the theatrical profession, that payment was only to be made during the theatrical season, or only during the time that the theatre was open to the public in each of those three years (*d*). Upon a charter-party engaging to pay £4 15*s*. per ton for goods shipped at Bombay for London, cotton to be calculated at 50 cubic feet per ton, evidence tendered upon the part of the defendant that there was a usage to pay according to the measurement taken at Bombay before the goods are loaded was held admissible. In this case, too, the plaintiff was allowed to show, in reply, that his captain had objected to receive the goods at Bombay measurement; measured them when on board; and delivered an account of that measurement to the shippers (*e*).

Years as understood in theatrical profession.

In relation to a charter-party.

A few other cases will show under what circumstances evidence of this nature has been admitted, and the line between "varying" and "adding an incident," is so very fine and so difficult to discover, that the more cases which can be accumulated with reference to this question of admissibility the easier will it be for the practitioner to decide in any case whether a custom is admissible in evidence or not. We shall find that the courts have not been quite consistent as to this matter, and although we ought always to weigh and not count our authorities, still, the majority in such cases must rule, and it is important to ascertain what the real intention of the majority

(*c*) *Reg.* v. *Stoke-upon-Trent*, 5 Q. R. 303; see *Phillips* v. *Innes*, 4 Cl. & Fin. 234.

(*d*) *Grant* v. *Maddox*, 15 M. & W. 737.

(*e*) See also *Benson* v. *Schneider*, 7 Taunt. 272; *Gould* v. *Oliver*, 2 Scott, N. C. 241.

Usage adding incident.

of the judges has been. There is now no doubt that a usage is admissible to add an incident which is not inconsistent with the writing, or that a usage cannot control the clear intention of the parties; but it is most difficult in many cases to say whether some particular custom is tacitly included in or tacitly excluded from a written document. This, of course, is a purely legal question. "We take it" said the Court in a case already referred to, "that the acknowledged distinction is this: If the evidence offered at the trial by either party is evidence by law admissible, for the determination of the question before the jury, the judge is bound to lay it before them and to call upon them to decide upon the effect of such evidence when offered, whether that evidence is of that character and description which makes it admissible is a question for the determination of the judge alone and is left solely to his decision." (*f*). Hence the importance of the following cases to members of the legal profession. In the case of *Mackenzie* v. *Dunlop* (*g*), it was decided that if A. gives an iron scrip order to B. and B. sells it to a third party, that third party may prove that the document has in the usage of trade an import not expressed on the face of it. Here then, we have the general principle laid down in the House of Lords. In *Lockett* v. *Nicklin* (*h*), where it appeared that the defendant ordered goods by letter which did not mention any time for payment, and the plaintiff sent the goods and the invoice, parol evidence to show that the goods were supplied on credit, the letter not being a valid contract within the Statute of Frauds, was held to be admissible. So where the plaintiff contracted in writing to build for the defendant the front and back walls of a house,

(*f*) *Lewis* v. *Marshall*, 7 M. & G. 729; see *Parker* v. *Ibbetson*, 4 C. B. N. S. 346. When the jury have decided on the meaning of the terms by the assistance of the usage, it is still for the court to construe the entire contract or document. *Hutchinson* v. *Bowker*, 5 M. & W. 5, 35, the judgment in *Neilson* v. *Harford*, 8 M. & W. 806.

(*g*) 3 Macq. H. of L. Cas. 22; 2 Jur. N. S. 957; see also *Fox* v. *Parker*, 44 Burb. 541.

(*h*) 2 Exch. 93.

"for the sum of 3*s.* per superficial yard of work nine inches thick, and finding all materials, deducting for lights." The lower part of the walls to the height of eleven feet was of stone two feet thick, the remainder of brick fourteen inches thick. In this case it was held that evidence of the usage of builders at the place to reduce brick work for the purpose of measurement to nine inches, but not to reduce stone work unless exceeding two feet in thickness, was admissible, and that the proper construction of the contract was that it provided only for the price of the brick work, leaving the stone to be paid for on a *quantum meruit* (*i*). These principles are also shown in the case of *Fawkes* v. *Lamb* (*k*), which is interesting as showing the greater weight of evidence of usage than that of any other species of parol evidence. There a written contract for the sale of goods was silent as to the time for which warehouse room rent was allowed by the seller to the purchaser, and it was held that it was competent to either party to show by parol evidence what time is allowed in such transactions by general custom, but that it was not competent to prove that the parties themselves agreed by word of mouth that certain time should be allowed. So in an action for the price of tobacco sold, evidence is admissible to show that by the established usage of the tobacco trade all sales are by sample, although the bought and sold notes said nothing to that effect (*l*). In another case, proof that by a custom of trade when timber is sold in bond at a sale by auction in London the buyer contracts to buy at a price including the duty payable, and he may by giving notice on the following day so to do, elect to take the timber in bond, and if he does so, he is then only bound to pay the price less the duty was admitted under the following circumstances. On the 10th February, 1860, the defendent bought timber in bond at a sale by auction at a

Weight of usage.

Sales by sample.

Custom in timber trade.

(*i*) *Symonds* v. *Lloyd*, 6 C. B. N. S. 691.
(*k*) 31 L. J. Ex. 168; 8 Jur. N. S. 385.
(*l*) *Syers* v. *Jones*, 2 Exch. 111.

price including the duty, the contract to be completed within fourteen days, and the Chancellor of the Exchequer, on the evening of that day, gave notice that a resolution would be moved in Parliament to reduce the duty on timber, and carried out that resolution on the 8th March. An Act of Parliament passed to that effect on the 5th May, and the reduction of the duty was thereby made to date from the 8th March. On the 11th February the defendant gave notice to the seller that he elected to take the timber in bond, and on the 24th February offered the price less the then duty, which the seller refused to take, and he also refused to give a delivery order for the timber. He subsequently brought an action for the price of the timber, in which judgment was given for the defendant on the ground that the usage which was admitted added a term to the contract (*m*). In *Bottomley* v. *Forbes* (*n*), which was an action upon a charter-party for freight upon goods shipped at Bombay for London, stating that cotton was to be "calculated at five cubic feet per ton," a usage was held admissible to prove that the measurement was to be calculated when the cotton was taken from a screw at Bombay, though it appeared that it afterwards expanded considerably before it was put on board, and that it would have given a third measurement after it had been unloaded. In that case it was also shown on the part of the plaintiff that the captain of the vessel refused to receive the cotton according to the admeasurement it had after it left the screw; that he measured it when on board, and delivered an account of such admeasurement to the shippers. Here we find that not only was usage admitted to add an incident to a written instrument which was silent as to where the measurement was to be calculated, and which, to be full and explicit, ought, under the circumstances, to have given some indication as to the intention of the parties, but evidence that the captain had

Usage as to measurement.

(*m*) *Clark* v. *Smallfield*, 4 L. T. N. S. 405.
(*n*) 6 Scott, 816; 5 Bing. N. C. 121.

at the time refused to be bound by such usage, and had taken such steps as lay in his power to defeat the efficacy of the usage were both properly admitted, the one on the one side, and the other on the other. Again, where the defendant, a shipowner, being desirous of chartering a vessel, and the plaintiff, a shipbroker, introduced him to S., another broker, who introduced him to L., who made known to B. that the charter was wanted, and through the negotiations of B. with the defendant D., chartered the vessel. The plaintiff sued for commission, alleging that the "introducing broker" was entitled by custom to a share of the commission. The plaintiff's counsel in this case proposed to ask a witness the question "What is the custom with regard to payment of broker's commission where a broker introduces another broker to a shipowner, who subsequently negotiates with the broker introduced?" and this evidence was rejected, the court held it was properly so (*o*). Bramwell, B., in considering the question of the propriety of the rejection of the evidence, said he thought it was properly rejected, "because the custom, if proved, would be unreasonable, and secondly, because it would not apply to the case."

Introducing broker-usage.

Custom unreasonable.

Still, in another case, where the question of the rights of "introducing brokers" was discussed, a custom among shipbrokers, that the "introducing broker" should receive commission on every renewal of a charter originally effected through him was received, and held to be admissible (*p*). We have now to note some of those cases in which evidence of usage has been held to be admissible on the ground that it varied the document to the interpretation of which it was to be applied. "In a certain sense," as Lord Campbell well remarked, "every material incident which is added to a written contract varies it, makes it different from what it appeared to be, and so far

As to varying contracts by usage.

(*o*) *Gibson* v. *Crick*, 1 H. & C. 42.
(*p*) *Allan* v. *Sundius*, 1 H. & C. 123; 31 L. J. Exch. 307; see also *Currie* v. *Smith*, 4 N. Y. Leg. Obs. 343.

it is inconsistent with it. If by the side of the written contract *without* you write the same contract *with* the added incident, the two would seem to import different obligations and be different contracts" (*q*). And in another case, Mr. Justice Blackburn truly remarked: "You do not need the evidence of custom unless it varies the contract, and makes it so far inconsistent with and different from that which it would be without the evidence of the custom" (*r*).

Addition of term by usage.

It may be added that truly every incident which is sought to be attached by proof of usage is a material incident, and that in fact it is really the addition of a term to the contract as it existed in ink. Yet the law has gone on laying down the dictum that any usage which would have the effect of varying or contradicting either expressly or by implication the terms of a written contract is inadmissible as evidence (*s*). The difficulty of understanding how a usage which adds an incident to a written contract is to do so without varying it or without contradicting it to the extent that the assertion of something concerning which it is silent is a contradiction, is to our minds very great. That it has been the means of throwing an element of uncertainty into the minds of many judges will appear from the nature of some of the decisions which we have noted above, and from those to which we must now refer. The dictum to which we have just referred was definitely laid down in a case in which it was attempted to set up evidence of usage in contradiction of a written instrument.

Contradiction by usage not allowed.

This was an action on warranty of "prime singed bacon," and evidence was offered of a usage in the bacon trade that a certain latitude of deterioration called "average taint" was allowed to subsist before the bacon ceased to answer the description of prime bacon (*t*). There is scarcely

(*q*) *Humfrey* v. *Dale*, 7 E. & B. 266.
(*r*) *Myers* v. *Sarl*, 3 L. J. Q. B. 9, at p. 15.
(*s*) *Menzies* v. *Lightfoot*, 40 L. J. Chan. 561; 11 L. R. Eq. 459.
(*t*) *Yates* v. *Pym*, 6 Taunt. 445.

any question more difficult to answer than that with reference to the principles upon which certain usages have been held to contradict, while very similar usages have been regarded only as explaining. The above case, in which there was an effort made to explain that the terms "prime singed bacon" included in the trade bacon which was to some extent deteriorated, seems to differ very little from that in which "Calcutta linseed" was held to describe a linseed which had 15 per cent. of inferior material mixed with it. But there are other cases which strike one as anomalous, and suggest the defectiveness of the legal principles under which they were decided. Thus, a declaration stated that by charter-party it was agreed between the owner of a ship called the *Maggie*, being in the London Docks, that the ship would load a cargo and therewith proceed to Hong Kong and deliver the same on being paid freight, "the ship to be conveyed to the charterer's agents in China free of commission on the charter." Averments that according to the custom of merchants in London, whenever a ship chartered in London for China is agreed to be conveyed to the charterer's agents, whether consigned free of commission on that charter or not, it is the right and duty of such agents as the consignee of the ship to procure a charter or cargo for the ship for any voyage from such port, and they are entitled to be paid the usual broker's commission on the amount of the freight payable under such contract; but in case the owners of the ship procure a charter or a cargo for the ship for the consignees, the consignees are entitled to the broker's commission on any freight payable under such charter-party, unless such right is excluded by special contract-breach, that although the ship was loaded, and arrived in China, and the plaintiff's agents, as consignees, performed their duty free of commission on the outward voyage and cargo, and were ready to procure a charter or a cargo from Hong Kong, and although the plaintiff performed all conditions precedent,

Inconsistent principles.

the defendant, without any default of the plaintiff's agents, procured a cargo for voyage from Hong Kong, and without any such default procured a cargo to the United Kingdom, the usual broker's commission on which amounted to a large sum; yet the defendant has not paid or allowed the same to the plaintiffs or their agents, whereby the plaintiffs were obliged to pay their agents a compensation in respect thereof. It was held under these circumstances, that the declaration was bad, since the custom did not explain or annex an incident to the contract, but added a term to it (*u*). In this case the Court (Pollock, C. B.) said, "Here it is sought not to explain the contract by the custom, or to add to it some incidental matter not inconsistent with what is expressed, but to impose on the party who has entered into one contract another and a different obligation, and because he has agreed to consign the ship to the charterer's agents on the outward voyage, to make him liable to pay the agents' commission on the homeward cargo. If that could be done, where is it to stop?"

Addition of term inadmissible.

In *Myers* v. *Dresser* (*x*), in which it was decided that the consignee of goods under a bill of lading has no right to deduct from the freight payable on delivery of goods the value of articles which, though mentioned in the bill of lading, turn out not to have been put on board, the defendant gave evidence of a usage prevailing in the mercantile world to allow a deduction for missing goods, whether shown to have been put on board or not; and the Court intimated that such evidence was inadmissible, Erle, C. J., remarking "If the general law be as I have suggested, this usage cannot avail the plaintiff. It is a self-evident contradiction to my mind to say that the general law does not allow the deduction, and that there is a universally established usage to allow it. A universal usage which is not according to law, cannot be set up to control the law."

Univeral custom and general law.

(*u*) *Phillips* v. *Briard*, 1 H. & N. 21; 25 L. J. Exch. 233; see also *Hudson* v. *Clementson*.

(*x*) 16 C. B., N. S. 646, at 660.

In *Blackett* v. *Royal Exchange Insurance Co.* (*y*), which was an action upon "ship and boat and other furniture," evidence was offered that it was not the usage of underwriters to pay for boats slung on the davits or the larboard quarter; but this evidence was rejected at Nisi Prius, and the decision of the judge was held to have been correct by the Court of Exchequer. "The objection," said Lord Lyndhurst, delivering judgment, "to the parol evidence is, not that it was to explain any ambiguous words in the policy, or any words that might admit of doubt, or to introduce matter upon which the policy was silent, but that it was at direct variance with the words of the policy, and in plain opposition to the language it used—*viz.*, that whereas the policy imported to be upon ship furniture and apparel generally, the usage is to say that it is not upon furniture generally but upon part only, including the boat. Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain" (*z*). It has been held, too, that in an action against the drawer of a bill of exchange drawn and indorsed in England and payable abroad, and dishonoured, evidence is not admissible to prove a usage among merchants here to entitle the holder at his option to demand from the drawer the amount of re-exchange, or the sum which he gave for the purchase of the bill, this being a usage which in terms contradicts the written instrument (*a*). Again, when at the request of M., the defendant, a proprietor of railway time tables, signed an order (which M. also signed), which was in these terms:

Direct variance of usage and contract.

Evidence of usage rejected.

(*y*) 2 Tyrwh. 266.

(*z*) See also *Howell* v. *Knickerbocker Life Ins. Co.* 19 Abb. Br. 217; compare *Boehen* v. *Williamsburgh Ins. Co.* 35 N. Y. 331. The decision in this case was spoken of with disapproval in *Humfrey* v. *Dale* (E. B. & E., 1004), and it is certainly difficult to distinguish the principles of its decision from that which actuated the court in other instances. Thus in *Miller* v. *Tetherington*, 30 S. J., Exch. 217, in which a custom in the timber trade between British North America and England, that underwriters under the ordinary forms of policy are not liable to pay general average on account of the jettison of any timber stowed on deck, was held to be a defence on an action for general average.

(*a*) *Suse* v. *Pompe*, 8 C. B. N. S. 538; 30 L. J. C. P. 75.

"Insert my advertisement for one year in 'Hotson's Local Time Table,' the Great Northern (and six others named), charge for insertion to be 10*s.* each monthly book." The plaintiff's time tables consisted of separate books, published monthly, one for each of the seven railways. The plaintiff did not employ M. to obtain orders for him, but on such as he obtained allowed him a commission. M. brought the defendant's order to the plaintiff, who approved it, and allowed M. his commission, and having inserted the advertisements for a whole year in each of the seven books, brought an action against the defendant to recover at the rate of seventy shillings a month. At the trial it was pressed on the part of the defendant what representations M. had made to him to induce him to enter into the written contract, the defendant's contention being that he was only liable for ten shillings per month in respect of one advertisement in one book. It was held that the effect of such evidence would be to vary a written contract, and that therefore it was not admissible (*b*). In the case of *Hall* v. *Janson* (*c*), which was an action on a policy of marine assurance in the ordinary form, in which the interest was declared to be "on money advanced on account of freight," and the Court alleged the interest to be in the shipowner, and that it became subject to a general average contribution, a plea to the Court stating a custom of London, where the policy was made, that assurance upon "money advanced on account of freight" should not be liable for a general average was held bad, the custom alleged being inconsistent with the terms of the policy (*d*). In *Cross* v.

Words of general import.

(*b*) *Brown* v. *Hotson*, 9 C. B. N. S. 442, 30 L. J. C. P. 106. In this case it was also expressly held, as we should have expected, that (assuming M. to have been the plaintiff's agent) if the issue had been whether the defendant was induced to sign the contract by M.'s fraud the evidence would have been admissible. See also *Reading* v. *Newnham*, 1 M. & Rob. 234, at p. 236.

(*c*) 4 E. & B. 500; see also *Foster* v. *Mentor Insurance Co.* 4 El. & Bl. 8; *Clarke* v. *Westrope*, 18 C. B. 765.

(*d*) *Bogert* v. *Canman*, Anth. N. P. 97.

Eglin (*e*), evidence had been offered for the purpose of showing that the plaintiffs, who had contracted for 300 *quarters* (*more or less*) *of foreign rye*, could not, consistently with the usage of trade, be required to receive so large an excess as 45 quarters over 300. The question as to the admissibility of the evidence was ultimately withdrawn from the attention of the Court; but Littledale, J., remarked that where words were of such general import, he should feel much difficulty in saying that evidence ought to be received to ascertain their meaning.

Terms added must be incidental.

It would appear further that terms which are not only not inconsistent with, but which are not really incidental to those expressed in the written contract, are to be held inadmissible of annexation by oral evidence of the particular usage of a trade. In a case, above referred to, where the charterer of a vessel for a voyage from England to China—the ship to be conveyed to his agents there free of commission—endeavoured to add to the charter-party a term that the agents in China should be entitled to procure charters for the return voyage from China, and be paid on commission on amount of freight mentioned in such charters, by means of proof of a particular custom, he was prevented on the ground of the inadmissibility of such proof (*f*). These very numerous and varying decisions are apt to confuse rather than direct the mind in reference to this most difficult question of evidence. We are, however, not left without assistance in relation to this matter. In some recent cases the point has been fully argued and the question fully discussed. The ruling in these cases must be held to be conclusive as to this matter, and it will be seen that these have the effect of giving to parol evidence of custom as modifying written agreements very considerable force. To our thinking, the true rule was stated in one of these cases by Lord.

Ruling cases.

(*e*) 2 B. & Ad.
(*f*) *Phillips* v. *Briard*, 1 H. & N. 21; 25 L. J. Exch. 233; *Fawkes* v. *Lamb*, 31 L. J. Q. B. 98.

The rule as to usage.

Campbell, where he said that "to fall within the exception of repugnancy the incident must be such as *if expressed in the written contract* would make it insensible or inconsistent." Addison advised young authors who were indulging in metaphors, to see whether they could be painted. It might be a safe rule for those who have to see whether a usage will attach an incident to a written contract or not, to see whether they can be written down together without producing a contradiction or nonsense.

Custom qualifying meaning.

In the recent case of *Hutchinson* v. *Tatham* (*g*) the law with regard to the admissibility of the parol evidence of custom to qualify the meaning of a written document has been carried to a very considerable extent. In that case the defendants acting as agents for a person of the name of Lyons, with his authority chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charter-party was expressed to be made, and was signed by the defendants, as "agents to merchants," the name of the principal not being disclosed.

Undisclosed principal usage.

At the trial evidence was tendered on the part of the plaintiff and admitted, of a trade usage, that, if the principal's name is not disclosed within a reasonable time after the signing of the charter-party, in such case the broker shall be personally liable. The jury found that there was such a custom, and that the name of the principal had not been disclosed within a reasonable time. The question for the Court was as to the admissibility of the parol evidence; and the judges, while re-stating the doctrine that no such evidence would be admissible to contradict the plain terms of a document, held that it was the law, that you might by evidence of custom add a term not inconsistent with any term in the contract, and that the evidence which was admitted at the trial was rightly admitted. As that case was decided upon the authority of *Humfrey* v. *Dale* (*h*) and *Fleet* v. *Murton* (*i*), this may be the

(*g*) 8 L. R., C. P. 482. (*h*) 7 E. & B. 266.
(*i*) 7 L. R., Q. B. 126.

most convenient place to state the effect of these cases. In the case of *Fleet* v. *Murton*, it appeared that the defendants were fruit brokers in London, and were employed by the plaintiffs, who were merchants, also in London, to sell for them. The defendants gave to the plaintiffs the following contract note: "We have this day sold for your account to our principal." Then followed a statement of the number of tons of raisins, (signed) Murton and Webb, Brokers, 25, Mincing Lane. The defendant's principal having accepted part of the raisins, and refusing to accept the rest, the plaintiffs brought an action on the contract against the defendants, and endeavoured to make the defendants personally liable by giving evidence that in the London fruit trade, if the brokers did not give the names of their principals in the contract, they were held personally liable, although, in fact, they contracted as brokers for a principal. It was held that the evidence of the custom was not inconsistent with the written document, and Cockburn, C. J., said (*k*): "For although where a party contracts as agent there would not, independently of some further bargain be any liability on him as principal. Yet, if a man, though professing on the face of the contract to contract as agent for another, and to bind his principal only, and not himself, choses to qualify that contract by saying that he will make himself liable, though he is contracting for another, and giving to another rights under the contract, he himself will incur the same liability as the principal. Now, although where a party professes to contract as broker, it might, *primâ facie*, be taken that he contracts without the intention of incurring liability on his own part, yet, if by the custom of the particular trade, there is that qualification of the contract (which, if written into the contract *in extenso*, would undoubtedly bind him), that qualification may, I think, be imported into the contract by evidence of the custom."

Undisclosed principals, agent's liability.

Agent's liability modified.

Qualification of usage introduced.

In the earlier but ruling case of *Dale* v. *Hum-*

Tacitly implied incident.

(*k*) At p. 129.

frey (*l*), which was very similar in many respects to the cases above alluded to, the plaintiff, a broker, who brought an action against the defendant, a broker, upon a written note of the sale of oil in which neither of the principal's names were set forth, proved a custom in the trade, that when a broker purchased without disclosing the name of his principal, he was liable to be looked to as principal, and the Court of Exchequer Chamber affirming the judgment of the Court of Queen's Bench (*m*), held that the evidence of the custom was admissible, on the ground that it did not contradict the written instrument, but explained its terms, or added a tacitly implied incident.

In relation to the decision of this case, the reader would do well to read the words used by Mr. Justice Blackburn in the case of *Myers* v. *Sarl* (*n*).

Repugnancy the test.

In any case it would seem that evidence of a custom will be admissible unless it introduces something repugnant to or inconsistent with the tenor of the written instrument; and it seems, from all the cases, that the qualification introduced into a written contract by the proof of a custom, is a qualification of construction, and that as a construction never can be a contradiction, any custom which would negative or contradict the plain words of a written document would be inadmissible in proof.

Varying decisions.

That there has been a considerable amount of vacillation in the minds of various judges as to the extent to which usages should be admitted in this connection is certain. Lord Eldon in one case (*o*) expressed a decided opinion in favour of the enlargement of the scope of usage in relation to the explanation of written contracts, but as one of the editors of one of the editions of Smith's "Leading Cases," observes, (*p*) "the tendency

(*l*) E. B. & E. 1004. (*m*) 7 E. & B. 266.
(*n*) 30 L. J. Q. B. 9, at 14, quoted ante, pp. 65 & 80.
(*o*) *Anderson* v. *Pitcher*, 2 B. & P. 168.
(*p*) See also *Trueman* v. *Loder*, 11 A. & E. 589; and *Johnstone* v. *Usborne*, ibid. 549.

of the Court appears now to be the other way." Since that was written, however, the decisions in two of the three recent cases we have above referred to have been given, and we cannot see that the principles of the law have suffered by the greater breadth which is thus given to interpretation of documents which have a decided tendency to be too narrow for the intentions of the parties, who from their great familiarity with the incidents to the contracts they are daily in the habit of entering into are apt to leave a great part of the contract understood, and put only a little of the less familiar matter into writing. Were the law to refuse to give effect to these understandings, it would really be refusing to give effect to the real intentions of the parties at the time the contract was entered upon. It would likewise be throwing difficulties in the way of important transactions which are often too urgent to be fully expressed in lengthy documents, and would be doing something to prevent the regenerative effects on law which may be looked for from custom. There is a possibility of too lax an admission of custom as a force, in such cases. The common business relations of others must not be regarded as so stringent as to bind anyone to perform his business in the same way. Each man is to be left free to contract in what way he pleases, but when the interpretation of a usage is possible in connection with a written agreement, it is as fair to conclude—on the side of one of the parties, that the contract was made with reference to it—as on the other side to infer that it was made without any reference to it, and with the intention of excluding its effect. Thinking thus, we cannot see that the law has suffered in any respect from the extension which has been allowed to the common conduct as interpreting the common transactions of men. Guarded by the consciousness that these customs are apt to push their way into the statute book—and we believe that it is well to be careful how they attain that position—little evil can arise.

Breadth of interpretation by usage.

Modern dictum.

Hence we find that the modern dictum where a phrase is used in a document, has two senses, one common to language, the other peculiar to the trade or business in connection with which the writing has been executed, it is to be understood as used in its peculiar meaning unless upon construing the whole contract you can see that either in express terms or by necessary implication the parties intended to use it in a different sense, is to be approved of and acted upon (*q*).

Definite rule.

To us it seems that a definite rule has been reached, and that a guiding principle has been attained. Everything, however, depends upon the consistency with which our judges follow the precedents to which we have alluded. A timid, retrograde policy is not impossible in the future. Judges are only too apt to prefer the narrow gauge of written words to the broad gauge of uncertain evidence of custom, and some there are who have expressed doubt as to the expediency of the recent policy, and hesitation as to carrying it legitimately into practice.

We have now to consider, as naturally connecting itself with the cases last referred to, the questions of principal and agent in relation to this principle of the admissibility of evidence of custom. We have seen that the principle of the law is that parties who make a bargain in connection with a particular trade must be taken to have contracted subject to or with reference to the known usages of that trade. It was laid down in the case of *Sutton* v. *Tatham* (*r*), that a person employing a broker on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though the principal himself be ignorant of them; and in a case in which *Sutton* v. *Tatham* was expressly approved of (Parkes, B.), the law was stated generally in these words:—"A person who deals in a particular market must be taken to deal accord-

Customs of Stock Exchange, how far they bind a principal ignorant of them.

(*q*) See *Myers* v. *Sarl*, 30 L. J. Q. B. 9, *per* Blackburn, J., at p. 15.
(*r*) 10 A. & E. 27.

ing to the custom of that market, and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that place" (*s*). That this is a correct view of the law has been over and over again decided. In an action where the plaintiffs, stockbrokers and members of the London Stock Exchange, had, it appeared, on the 28th of August, 1856, at the request of the defendant, bought for him twenty shares in a joint-stock bank, called "The Royal British Bank," to be paid for on the "settlement day," which was on the 15th of September, and duly forwarded to him the usual broker's contract-note. The bank stopped payment on the 3rd September, and ultimately became bankrupt. On the 11th the defendant repudiated the transaction, and gave the plaintiffs notice not to pay the price on his account. The plaintiffs, having been compelled, according to the rules of the Stock Exchange, to pay for shares on the settlement day, sent the defendant the certificates and transfers, and, upon his declining to accept them, sued him for the money, and it was decided that they were entitled to recover it (*t*). So in the case of *Graves* v. *Legg* (*u*), the defendants, London merchants, employed a broker in Liverpool to purchase some wool. The broker negotiated a sale by the plaintiff to the defendants of certain bales deliverable at Odessa, "the names of the vessels to be declared as soon as the wools were shipped." In this transaction the broker acted for both plaintiff and defendants. By the custom of Liverpool, where a contract contained a stipulation that notice of an event should be given by the vendor to the vendee, it was usual for the vendor to give the notice to the broker, who communicated it to the vendee. In this case it was held, both in the Court of Exchequer and in

Notice to broker good where notice to vendee was necessary. Usage.

(*s*) *Bayliffe* v. *Butterworth*, 1 Exch. 425, *per* Alderson, B., at p. 429.
(*t*) *Taylor* v. *Stray*, 2 C. B., N. S. 175; see also *Smith* v. *Lindon*, 5 C. B., N. S. 587; *Stray* v. *Russell*, 29 L. J. Q. B. 279; *Lloyd* v. *Gilbert*, 35 L. J., Q. B. 74.
(*u*) 11 Exch. 642, affirmed 2 H. & N, 210.

that of the Exchequer Chamber, that the defendants were bound by such usage, and, therefore, that a notice by the plaintiff to the broker of the names of the vessels on which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to the defendants. But this rule might seem irreconcileable with the general principle which we stated above, that it was only to be presumed that the parties contracted according to the terms of an existing custom, and that that presumption was capable of rebuttal; for here we see that a usage may make a man liable to certain incidents of a contract, although he can satisfactorily prove that he was in ignorance of the custom. It also seems to be in almost direct opposition to the rules laid down in *Gabay* v. *Lloyd* (*x*) and *Bartlett* v. *Pentland* (*y*). In the first of these it was found in special verdict that a certain usage with respect to policies prevailed amongst the underwriters subscribing policies at Lloyd's Coffee House, in London, and merchants and others effecting policies there, and that the policy in question was effected at Lloyd's Coffee House; but it was not found that the plaintiff was in the habit of effecting policies at that place, and it was held that this usage was not sufficient to bind the plaintiff. And in the latter a custom was proved to be in force at Lloyd's Coffee House, to consider a set-off as payment between underwriter and broker, and it was held that such custom was not binding on one who was not shown to be cognizant of it, or to have assented to it. Yet these cases were decided before the case of *Bayliffe* v. *Butterworth*—in which the general principle, that the usage of a particular market binds him who buys or sells in it, whether he is aware of it or not, was laid down—came before the Court of Exchequer, and Parkes, B., while he did not question the authority of these cases, distinguished them from the one before the Court, which was one in which a person had been authorized to make a

This rule reconciled with general principle.

Rules in other cases. Customs at Lloyd's Coffee House.

These reconciled with doctrine in *Bayliffe* v. *Butterworth*.

(*x*) 3 B. & C. 793. (*y*) 10 B. & C. 760.

contract for a principal, and he remarked that it appeared to him "that a person who authorizes another to make a contract for him, authorizes him to make the contract in the usual way," and that "the question here was as to the authority which the plaintiff received." (*z*) This seems a perspicuous distinction. The scope of authority is to be ascertained by the necessities which are incident to the act which an agent has to do. His action in the matter will be estimated by the possibilities of the trade in connection with which he transacts, and those possibilities are modified by the usages of the trade. It is in the power of the principal to define the agent's authority with a strictness which will prevent the operation of the customs of the place or trade. If he fails to do so, he must not complain if his authority is interpreted by the ordinary usages of the trade, and if he finds himself bound by these, even although he is ignorant of their existence. In the cases to which reference has been made above (*a*), it was, as in the case of *Bayliffe* v. *Butterworth*, always a question of authority, and it cannot, therefore, be matter for wonder that the principle enunciated in *Gabay* v. *Lloyd* has been confirmed, and that the dictum in *Scott* v. *Irving* (*b*), that a usage to substitute another person as debtor to the principal can only bind those who have notice of it, has been adopted (*c*). The character of the usage and its effect upon the inter-relation of parties must be considered before it is admitted to affect a contract entered into by persons who were ignorant of it. Some usages are so evidently technical that it would be wrong to suppose that persons contracting without knowing them could reasonably anticipate their existence, or the existence of any in that factual connection. Many, on the other hand, are so

The scope of authority.

Nature of usage to be considered.

(*z*) 1 Exch. pp. 428, 429.

(*a*) *Taylor* v. *Stray*, 2 C. B. N. S. 175; *Stray* v. *Russell*, 29 L. J. Q. B. 279; *Graves* v. *Legg*, 11 Exch. 642; 2 H. & N. 216, *ante*, p. 91.

(*b*) 1 B. & Ad. 606.

(*c*) *Sweeting* v. *Pearce*, 7 C. B. N. S. 449; see also *Adams* v. *Peters*, 2 C. & K. 723.

Presumption in relation to usages.

palpably matters of general convenience, and belonging to a trade in such rapid growth, that it must be presumed to be making its own laws in the establishment of customs, that it is right to presume that the individual contracting, although ignorant of the particular custom, must have been aware of the existence of usage, may have surmised their nature, and even if he did not, was at least willing to enter into a contract, the precise terms of which were unknown to him, because the incidents were to be attached by a usage of which he was ignorant. Just as one man trusts another to work for him with general authority as an agent, trusting to the honour and honesty of the individual, so may one trust a usage to regulate one's rights —for a usage is the outcome of the honour, honesty, fair dealing, and convenience of a class of men. The admissibility of proof of a usage as against one who was ignorant of it is a question which might well be left to be decided in each individual case. There could, it seems to us, be little reason for dissatisfaction in the admission of a rule of the Liverpool Stock Exchange, in evidence between parties not members of it, when the question was, what is a reasonable time for the completion of a sale of shares made at Liverpool through the agency of brokers? (*d*)

Confidence in the usages of a trade.

Incidents annexed by common law.

It may be well to remark here that the way in which usage is permitted to annex incidents to written contracts, is another proof of its relationship to the Common Law. Law annexes various incidents to contracts, and these differ from those annexed by usage only in the circumstance that they claim their own recognition without proof, while the others have to be evidenced. It may be useful shortly to allude to some of these, although many may be in the immediate memory of the reader. In contracts for the sale of estates, whether freehold or leasehold, the law, in the absence of express stipulation, it will be remembered, implies an undertaking on the part of the

(*d*) *Stewart* v. *Canty*, 8 M. & W. 160; see also *Stewart* v. *Aberdein*, 4 M. & W. 211.

vendor that he will make out a good title (*e*), and an undertaking on the part of the vendee that if the title prove defective, the damages to which he shall be entitled shall be limited to the expenses actually incurred in the investigation, and shall only be nominal for the loss of the bargain (*f*). So, in a demise of real property, the law annexes a condition that the lessor has a good title to the premises, and that the lessee shall not be evicted during the term (*g*); but it does not imply from the nature of the contract a warranty that the property leased, whether it be a house or land, shall be in a proper state to admit either of habitation or cultivation, or that in other respects it shall be reasonably fit for the purposes for which it is taken (*h*). As to title.

Again, in relation to marine insurance, we have an instance of this legal annexation of incidents. One of these is that in every voyage-policy, whether it be on a ship or on goods, a warrant of seaworthiness at the commencement of the risk is implied. These further conditions are also understood as forming a tacit part of the contract—that the voyage is to be commenced in a reasonable time, that all material circumstances are to be disclosed. If these conditions are not performed, this omission will render the policy void, whether the omission has been due to fraudulent motives or not (*i*). These decisions are only given by way of illustrating the method by which usage annexes incidents to written contracts. It will be understood that the method of such annexation is precisely the same, and that there is a close analogy in this respect between the usages of trade and the Common As to marine insurance. Voyage commenced.

(*e*) *Souter* v. *Drake*, 5 B. & Ad. 992, 3 N. & M. 40; *Doe* v. *Stanion*, 1 M. & W. 695, 701, *per* Parke, B.; *Hall* v. *Betty*, 4 M. & Gr. 410. These cases overrule *George* v. *Pritchard*, *Reg.* v. *Moo.* 417.

(*f*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Walker* v. *Moore*, 10 B. & C. 416; *Robinson* v. *Harman*, 1 Ex. R. 855, *per* Parke, B.; *Wordington* v. *Warrington*, 8 C. B. 134.

(*g*) *Per* Parke, B. in *Sutton* v. *Temple*, 12 M. & W. 64.

(*h*) *Sutton* v. *Temple*, 12 M. & W. 52; *Hart* v. *Windsor*, Id. 68. But see as to letting of furnished house, *Smith* v. *Marrable*, 11 M. & W. 5.

(*i*) *Gibson* v. *Small*, 4 H. of L. Cas. 398, *per* Parke, B.

Law—an analogy which we have endeavoured to keep before the reader's mind, as it seems, in our opinion, to explicate the real nature of each. It will be remembered, too, that the incidents which are annexed by the Common Law are very few in number, and that there may be innumerable useful incidents in relation to every trade and business, and every transaction which is made in the course of these, which might well be annexed, and which, therefore, fall within the province of that handmaid of the Common Law—usage—to supply. The nature of these may be understood from what has already been said, and the scope of the authority of usage will also be appreciated from the various cases of treating the admissibility of evidence of such customs.

Necessity for usage.

Usage and legal enactments.

One other matter may be alluded to in relation to usage, and that is its relation to legal enactments. We have already seen that customs which are an invention for the convenience of those who are employed in trade, and are, in fact, the natural growth of law in organization, when they are judicially recognized cease to be customs, provable by evidence; but rise to the level of laws evidenced by the legislative authority, which resides in the judges or by the existence of an Act of Parliament which has embodied the former usage (*k*). It follows, therefore, that when the Courts have ascertained and declared a usage, it is alterable only by legislature, and it will not affect such a recognized usage to prove that a usage of trade which varies its terms actually exists. Hence it is that we have the well-known rule that a custom opposed to a statute is bad (*l*), and that no usage or custom can be set for the purpose of controlling the rules of law (*m*). It follows, therefore,

Usage cannot control Act of Parliament.

(*k*) *Ante*, p. 2, 5, *et seq.*

(*l*) *Ante*, p. 26 and 27, and see *Walker* v. *Transportation Co.* 3 Wall, 150; *Winter* v. *United States*, Hempst. 344.

(*m*) *Hinlon* v. *Locke*, 5 Hill, 437; see *Thompson* v. *Ashton*, 14 J. R. 316; *Beirne* v. *Doed*, 1 Seld. 95; *Wheeler* v. *Newbold*, 16 N. J. 392; *Huggins* v. *Moore*, 34 N. J. 417; *Dujuid* v. *Edwards*, 50 Barb. 288; *Woodruff* v. *Merchants' Bank*, 25 Wend. 674; *Prith* v. *Baker*, 2 J. R. 327; *Lowen* v. *Newel*, 18 Barb. 391.

necessarily from these rules, that the admissibility of the evidence of custom to explain the meaning of a word used in any contract whatever is subject to the qualification that, if an Act of Parliament have given a definite meaning to any particular word, it must be understood to have used it with that meaning, and no evidence of custom will be admitted to attach any other meaning to it. The words to which Acts of Parliament have given definite meaning are for the most part those which denote weights, measures, or numbers. Thus, in one case, "bushels" were held to mean only statute bushels (*n*). In another, "quarters of corn" was understood to mean legal quarters (*o*). In *Hughes* v. *Humphreys* (*p*) the statute 5 & 6 Will. 4, c. 63 s. 6, which abolishes all local or customary measures, and imposes a penalty on every person who shall sell by any denomination or measure other than one of the imperial measures, or some multiple or aliquot part thereof, was held to apply only to the sale by measure of capacity, and not to sale by weight estimated in pounds. And that, therefore, it did not extend to sale by any local term designating a given number of pounds' weight. As to sale of wheat by Welsh hobbett, it appearing by evidence that this designated 168 lbs. weight, and that a sale by hobbett entitled the purchaser to so many pounds of wheat. And in another case a contract for the sale of a certain number of tons of iron, "long weight," was held not to be a contravention of the statute; and that consequently such a contract was valid. It appeared in that case that the 15th section of 5 Geo. 4, c. 74, is not repealed by the Act alluded to, and that, therefore, contracts by local weight may be lawfully made if the proportion to the standard is expressed (*q*). It has been held that a custom that every pound of butter sold in a particular market town shall weigh eighteen ounces is bad; but it was a question whether

Where meaning is given to word by Act.

"Bushels."

"Hobbett."

Custom as to weight.

(*n*) *Hockin* v. *Cooke*, 4 T. R. 314.
(*o*) *The Master of St. Cross* v. *Lord Howard de Walden*, 6 T. R. 338.
(*p*) 3 E. & B. 954.
(*q*) *Giles* v. *Jones*, 11 Exch. 393.

As to "lumps."

a custom to sell butter *in lumps* might not be supported (*r*).

As to importance of subject.

Little remains to be added in this place. It may be objected that, after all, undue importance has been given in the foregoing pages to what is, after all, only one branch of the Law of Evidence. We cannot, however, admit that that is so. It is true it is a branch of the law of evidence, but it is one of the most important branches, and it is doubly important to the real student of jurisprudence, by reason of the fact that it is, as it were, the connecting link between the science of evidence and the science of law. The fact that questions in relation to usage have been so frequently litigated, shows the importance of the subject and the importance of having the main questions in connection with it definitely settled. If we could feel that our work had contributed to this end we should feel that this book was not insignificant, but of very great practical worth. If we have not that consciousness, our failure is due to the execution, and not to the purpose.

(*r*) *Noble* v. *Durrell*, 3 T. R. 271; see also *Wing* v. *Earle*, Cro. Eliz. 267.

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